. 84-16-AFX   Title: Kenneth Cory, Leo T. McCarthy and Jesse R. Huff, Appellants
atus: GRANTED   v.
Western Oil and Gas Association, et al.

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ly 5, 1984   Court: United States Court of Appeals for the Ninth Circuit

Counsel for appellant: Eagan, Dennis M.

Counsel for appellee: Verleger, Philip K.

try	Date	Note	Proceedings and Orders
1	Jul 5 1984	G	Statement as to jurisdiction filed.
2	Aug 8 1984		DISTRIBUTED. September 24, 1984
3	Aug 10 1984	X	Motion of appellees Western Oil and Gas Assn., et al. to affirm filed.
.	Aug 14 1984	X	Reply brief of appellant Kenneth Cory, et al. filed.
5	Sep 4 1984	X	Supplemental brief of appellees Western Oil & Gas Assn., et al. filed.
5	Oct 1 1984		PROBABLE JURISDICTION NOTED. Justice O'Connor OUT.
			**
7	Nov 14 1984		Brief amicus curiae of Cities of Santa Monica, et al. filed.
3	Nov 15 1984		Brief of appellants Kenneth Cory, et al. filed.
9	Nov 15 1984		Joint appendix filed.
0	Dec 6 1984		Record filed.
1	Dec 15 1984	X	Brief of appellees Western Oil & Gas Assn., et al filed.
2	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 26, 1985. (4th case.)
3	Jan 10 1985		CIRCULATED.
.	Feb 15 1985	X	Reply brief of appellants Kenneth Cory, et al. filed.
5	Feb 26 1985		ARGUED.

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No.

In the Supreme Court

OF THE

United States

October Term, 1983

Kenneth Cory, Leo T. McCarthy, and
Jesse R. Huff, members of the
California State Lands Commission,
Appellants,

vs.

Western Oil & Gas Association, et al.,
Appellees.

On Appeal from the United States Court of Appeals
For the Ninth Circuit

JURISDICTIONAL STATEMENT

John K. Van de Kamp
Attorney General of the
State of California

N. Gregory Taylor
Assistant Attorney General

Dennis M. Eagan
Deputy Attorney General
(Counsel of Record)

6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

A State regulation governing the issuance of ground leases for state property includes authorization for a form of rent calculated with reference to the volume of commodities moved across the leased land by the lessee. The regulation does not prescribe rates.

1. Does the Commerce Clause of the Constitution prohibit such a form of rent, regardless of amount, if the lessee is engaged in interstate or foreign commerce?

2. If the lessee is engaged in foreign commerce, does such a form of rent constitute a tax on imports or exports, in violation of the Import-Export Clause of the Constitution?

3. If the lessee is engaged in interstate or foreign commerce, does such a form of rent constitute a duty of tonnage, in violation of the Tonnage Clause of the Constitution?

PARTIES BELOW

Appellants Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff constitute the current membership of the California State Lands Commission. Appellants McCarthy and Huff are the successors in office to two former members of the Commission who were named in the complaint. Appellees, in addition to the Western Oil and Gas Association, named in the caption, are Pacific Refining Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California, and Union Oil Company of California.

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No.

In the Supreme Court

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OCTOBER TERM, 1983

KENNETH CORY, LEO T. MCCARTHY, and
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vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
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**On Appeal from the United States Court of Appeals
For the Ninth Circuit**

JURISDICTIONAL STATEMENT

Appellants Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff, members of the California State Lands Commission, appeal from the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. A-1-A-13), as modified (App. B, *infra,* p. A-14), is reported at 726 F.2d 1340. The opinion of the district court (App. D, *infra,* pp. A-17-A-25) is unreported.[1]

[1]The issues of state law raised in the complaint were finally disposed of by the state court of appeal, following an abstention order by the district court. The opinion of the state court of appeal is officially reported at 105 Cal.App.3d 554, and unofficially reported at 164 Cal.Rptr. 468.

JURISDICTION

This is an action for declaratory and injunctive relief regarding a state regulation that is alleged to violate the Commerce Clause, the Import-Export Clause, and the Tonnage Clause of the United States Constitution. Federal jurisdiction exists under 28 United States Code section 1331. The judgment of the court of appeals was entered on January 13, 1984 (App. A, *infra*, pp. A-1-A-13), and a timely petition for rehearing was denied on April 6, 1984 (App. E, *infra*, p. A-26). The notice of appeal was filed in the court of appeals on April 10, 1984. (App. F, *infra*, p. A-27.) The jurisdiction of this Court is invoked under 28 United States Code section 1254(2). (See *John P. King Mfg. Co. v. City Council of Augusta* (1928) 277 U.S. 100, 102-104; *McCollum v. Board of Education* (1948) 333 U.S. 203, 206.)

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

1. The Commerce Clause of the United States Constitution, which provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. . . ." (U.S. Const., art. I, § 8, cl. 3.)

2. The Import-Export Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports. . . ." (U.S. Const., art. I, § 10, cl. 2.)

3. The Tonnage Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any duty of tonnage. . . ." (U.S. Const., art. I, § 10, cl. 3.)

4. Section 2003 of title 2 of the California Administrative Code, which sets forth the alternative types of rent that may be used for ground leases issued by the California State Lands Commission, and which provides:

"2003. Rental.

"(a) Rental for the various categories of use shall be generally as follows:

"(1) Commercial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) A percentage of annual gross income (the percentage being based on an analysis of the market for like uses and other relevant factors);

"(B) 9% of the appraised value of the leased land;

"(C) The volume of commodities passing over the lease premises.

"(2) Industrial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) 9% of the appraised value of the leased land together with 2¢ per diameter inch per lineal foot of pipelines and conduits on the leased premises;

"(B) The volume of commodities passing over the lease premises.

"(3) Right-of-Way Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $100:

"(A) 9% of the appraised value of the leased lands, together with compensation for any damage caused to such lands;

"(B) 2¢ per diameter inch per lineal foot;

"(C) The volume of commodities passing over the lease premises.

". . . . ."

(Cal. Admin. Code, tit. 2, § 2003.)[3]

STATEMENT OF THE CASE

The California State Lands Commission (Commission) is empowered to issue ground leases for various categories of land owned by the State of California (Cal. Pub. Resources Code, §§ 6501-6509.) The land subject to lease includes upland property as well as lands beneath navigable waterways. Pursuant to statutory authorization (Cal. Pub. Resources Code, §§ 6108, 6301, 6501.2), the Commission has enacted regulations governing its leasing practices. These regulations categorize ground leases by type (e.g., commercial, industrial, right-of-way) and set forth the alternative types of rent that may be negotiated, including various forms of fixed annual rents and also variable rents, such as rents based on a percentage of gross income and rents based on the volume of commodities passing over the leased land (volumetric rent).

By amendment to its regulations in 1976, the Commission added volumetric rent to the alternative types of rent that could be employed for ground leases. The amendment authorized the use of this type of rent but did not prescribe rates. Specific rates were left to future negotiations

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[3]The full text of section 2003 and of related sections of the regulations of the State Lands Commission is set forth in Appendix G, *infra*, pages A-29-A-37. Section 2003, with immaterial revisions, is the current version of former sections 2006 and 2007, which are the sections containing the challenged provisions as originally enacted. The full text of former sections 2006 and 2007 is set forth in Appendix H, *infra*, pages A-38-A-42.

on a lease-by-lease basis. In common with the rental modes previously set forth in the regulation, the new alternative rental mode applied across the board to all types of lessees, and regardless of the nature of their business, whether intrastate or interstate.

The amendment followed extensive administrative hearings. The record made during the course of those hearings established that volumetric rent is employed in various types of ground leases by both public and private lessors, as to improved and unimproved land, and as to upland property and tide and submerged lands. With particular regard to the ground leases of local port districts, it was established that ports charge based upon the volume of commodities moved across the leased property, not only where the port provides improvements, but also in circumstances where wharves and related facilities have been constructed and are maintained by the lessee, not the lessor. (Administrative Record (A.R.), pp. 352-353, 412 (Port of San Francisco); 424-425 (Port San Luis Harbor District); pp. 909, 916, 922, 931-932, 706, 731 (Port of Long Beach).)

Among the opponents of the amendment were various oil companies, some of whom lease marine terminal sites from the Commission. These leases give the companies the right, for payment of rental, to appropriate to their exclusive use for a term of years discrete parcels of state-owned land for the construction of berthing facilities for the loading and offloading of petroleum and petroleum products.[3]

[3]Plaintiff Standard Oil Company of California, for instance, leases 33 acres of state-owned tide and submerged land adjacent to its refinery at Richmond, upon which it has constructed a wharf and connecting causeway.

Subsequent to adoption of the amendment, the plaintiff oil companies and their trade association, the Western Oil and Gas Association, filed suit in the district court, seeking a declaration that the regulation authorizing the negotiation of volumetric rent was invalid, and an injunction prohibiting the members of the Commission from demanding and collecting such rent. The complaint alleged that any such rental charges were *per se* invalid under the United States Constitution as "(a) an unlawful charge, duty or impost on imports; (b) an undue burden and unlawful charge upon interstate commerce; and (c) an unlawful duty on tonnage."

The complaint also presented issues of state law, alleging that the regulation was contrary to a state leasing statute, and that the regulation was "unreasonable, arbitrary and capricious." Following an abstention order by the district court, these state law issues were finally determined adversely to the plaintiff companies. (*Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554 [164 Cal.Rptr. 468].)

Upon return of the case to the district court, the parties filed cross-motions for summary judgment on the remaining federal constitutional issues. The question presented was the *per se* validity under the Constitution of the type of volumetric rent authorized by the Commission's regulation, regardless of amount.[4] The district court gave judg-

[4]At oral argument on the motions, plaintiffs' counsel framed the issue as follows: "To us what this case is about is just the validity of a throughput charge *per se*, whether the State can charge even one-millionth of [a mill] as a throughput fee." (Reporter's Transcript, p. 12.) Neither in their pleadings nor in their moving papers did plaintiffs ask that particular volumetric rents that had been negotiated for specific leases be declared invalid, although there were references to alleged high rates of return on some leases.

ment for the plaintiffs. It rejected as inapposite the State's argument that volumetric rent was a commonly-used and reasonable form of rent and thus permissible under the Commerce Clause (App., *infra*, p. A-22.) The court also denied any applicability of this Court's cases concerning exemption of the States from the Commerce Clause when they act as "market participants", concluding that "there is no analogous competitive marketplace involved in this case." (App., *infra*, p. A-23.) Finally, it rejected the State's contention that neither the Import-Export Clause nor the Tonnage Clause was applicable to ground rents. (App., *infra*, pp. A-23-A-24.) The court determined that a volumetric land rental, without the provision of additional services and facilities by the State, constituted the type of "trade barrier" that the Commerce, Import-Export, and Tonnage Clauses were "collectively" intended to prevent, and that such a rental "places a burden on interstate and foreign commerce that cannot be justified under the facts of this case." (App., *infra*, p. A-24.)

The district court entered judgment enjoining the Commission "from assessing and collecting rent based upon the volume of commodities in interstate and foreign commerce passing over tidal and submerged lands in reliance upon California Administrative Code §§ 2005(b)(2) and 2005 (b)(3)."[5] (App., *infra*, p. A-24.)

On appeal, the court of appeals affirmed, concluding that the regulation authorizing the negotiation of volumetric rent was barred by the Commerce Clause and the Import-Export Clause. (App. *infra*, p. A-13.) In reaching its con-

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[5]Currently Cal. Admin. Code, tit. 2, §§ 2003(a)(2) and 2003 (a)(3). (See App., *infra*, pp. A-33-A-34.)

clusion under both constitutional provisions, the court relied on the decisions of this Court invalidating certain types of taxes. The court did not reach plaintiffs' Tonnage Clause contention.

On the Commerce Clause issue, the court rejected the State's argument that the regulation authorized a reasonable form of rent, given the common use of this form of rent in the rental market generally. Instead, it concluded that the case was governed by Supreme Court cases concerning "user taxes", citing cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707. (App., *infra,* pp. A-8-A-9.) In so doing, it rejected the application of this Court's cases distinguishing taxes from rent charged for the private appropriation of particular parcels of public property. Applying the "user tax" cases, it concluded that volumetric rent for unimproved land necessarily yielded rentals "disproportionate to the benefits conferred by the State," that such rents were "not directed toward compensating the State for the use of the land" or the "wear and tear" from the use of the land, and that there was "no sufficient relation between the measure employed and the extent of the use of the state property." (App., *infra,* pp. A-8-A-9.) The court also rejected the State's alternative contention that, as but one "market participant" in the negotiation of ground leases, both for upland property and tide and submerged lands,[6] the Commission was not subject to the strictures of the Commerce Clause.

[6]There are many competing lessors of upland property. And as the court recognized (App., *infra,* p. A-6), ownership and administration of tide and submerged lands is divided among the State, local government entities, and private interests. Over 60 cities, counties, and districts hold state legislative grants of tide and submerged land. (E.g., Cal. Stats. 1913, ch. 317, p. 605 (Port of

On the Import-Export Clause issue, the court adopted a similar rationale. Having determined that "there is no correlation between the volumetric rates and benefits conferred by the State," it concluded that the State "is 'levying . . . on citizens of other States by taxing goods merely flowing through their ports to the other states not situated as favorably geographically.'" (App., *infra*, pp. A-12-A-13.)

THE QUESTIONS ARE SUBSTANTIAL

The court of appeals concluded that the Commerce and Import-Export Clauses[7] completely foreclose use by the States of volumetric rental—regardless of amount—when leasing unimproved land to lessees engaged in interstate or foreign commerce. In so holding, the court employed decisions of this Court from the tax field that have no application to the issue at hand, and at the same time ignored other decisions of this Court which establish that the States are entitled to ask reasonable rent of those in interstate or foreign commerce who wish to appropriate public property to their exclusive use in furtherance of

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Richmond); Cal. Stats. 1968, ch. 1333, p. 2554 (Port of San Francisco); Cal. Stats. 1911, ch. 654, p. 1254 (Port of Oakland); Cal. Stats. 1911, ch. 656, p. 1256 (Port of Los Angeles); Cal. Stats. 1911, ch. 676, p. 1304 (Port of Long Beach).) In addition, nearly 100,000 acres of tide and submerged lands are in private ownership pursuant to one or another statutory sales program. (See Taylor, Patented Tidelands: A Naked Fee? (1972) 47 State Bar J. 420, 421; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 526 [162 Cal.Rptr. 327, 606 P.2d 362].)

[7] The court of appeals did not reach plaintiffs' assertion that volumetric rent is barred as well by the Tonnage Clause. Because the district court reached this additional contention, and decided it adversely to the Commission, the Tonnage Clause question is included among those presented by this case, in order that this Court may render a fully-dispositive decision.

such commerce. The court also ignored the common use of volumetric rental by lessors generally—including both local ports and these very plaintiffs—in connection with ground leases for unimproved land.

The question is an important one. The decision of the court of appeals invalidates over 30 ground leases issued by the State Lands Commission. Further, its rationale undermines the time-honored practice whereby public ports receive for the use of port land—both improved and unimproved—payments that are calculated by reference to a per-unit charge for the various types of commodities that cross over port lands. The public ports that make these volumetric charges are subject to the same constitutional strictures as are the States. (See, e.g., *Guy v. Baltimore* (1879) 100 U.S. 434.)

I. THE COURT OF APPEALS MISAPPLIED AND DISREGARDED DECISIONS OF THIS COURT, AND SO REACHED THE WRONG CONCLUSION

The court of appeals did not dispute that the Commission had a reasonable basis in accepted ground lease rental practice for authorizing use of the challenged form of rent. Nor did it satisfactorily explain why, if the rental form could be employed regarding lessees engaged in intrastate commerce (as the state court of appeal had previously held), it could not also be employed regarding lessees engaged in interstate or foreign commerce. The decision was not grounded on a determination that the Commission had employed the rental mode in a way that discriminated against interstate or foreign commerce. Nor did the deci-

sion rest on asserted abuses in the form of unreasonably high rents; in fact, the court ignored the Commission's expressed willingness to defend the reasonableness of particular rents, should they be challenged in any future court proceedings. Finally, the court did not point to a single actual adverse impact of this form of rent on interstate or foreign commerce.

Instead, the decision was based on the completely abstract premise that *any* volumetric rent negotiated by the Commission would, ipso facto, constitute an unreasonable burden on interstate and foreign commerce and a "tax" on imports. The court's sweeping prohibition finds no basis in the decisions of this Court, and in fact conflicts with Supreme Court precedent.

A. Volumetric Rent Is Constitutionally Permissible

The court of appeals necessarily conceded that the State has a "right to the reasonable rental value of its property." (App., *infra,* pp. A-6, A-8.) It is established that interstate or foreign commerce is not entitled to a subsidy by the States; it "must pay its own way." (See *Ott v. Mississippi Barge Line* (1949) 336 U.S. 169, 174; *Western Live Stock v. Bureau* (1938) 303 U.S. 250, 254.) A venerable line of precedent makes clear that a State may obtain compensation for services rendered or property provided, even though the cost of conducting interstate or foreign commerce is thereby increased. (E.g., *Cooley v. Board of Wardens* (1851) 53 U.S. (12 How.) 299, 315-320 (pilotage); *Atlantic & Pacific Tel. Co. v. Philadelphia* (1903) 190 U.S. 160, 162-163 (cost of supervising telegraph company's local operations); *Transportation Co. v. Parkersburg* (1882)

107 U.S. 691, 701-702 (wharfage); *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 97-98 (rent for space occupied by telegraph poles).) In the words of this Court:

> "Reasonable charges for the use of *property, either on water or land,* are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. [Citations omitted.] That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the *property employed,* or for facilities afforded for its use. . . ." (Emphasis added.) (*Gloucester Ferry Co. v. Pennsylvania* (1885) 114 U.S. 196, 217.)

Contrary to the suggestion of the court of appeals (App., *infra,* pp. A-2, A-9), no constitutional principle narrowly limits the type of rent that States may employ in leasing their property solely to fixed rents derived from the leased land's fee value. Under the decisions of this Court, such charges may take various forms, including charges which, were they imposed as taxes, divorced from the conferral of specific property rights, would be prohibited by the Constitution. (See *Transportation Co. v. Parkersburg, supra,* 107 U.S. at pp. 698-699 (charge for use of a public wharf graduated by vessel tonnage "is rent charged by the owner of the property for its temporary use," therefore not a duty of tonnage proscribed by the Tonnage Clause); accord, *Packet Co. v. Keokuk* (1877) 95 U.S. 80, 84-85, 87.)

The constitutional test is simply whether the form of rent used is a reasonable one[8] and is non-discriminatory. The Commission's volumetric rental mode meets both tests.

Concerning reasonableness, this form of rent is well-grounded in accepted ground lease practices. The extensive administrative record compiled before the Commission during the hearings on the proposed amendment established that volumetric rental is commonly employed in ground leases (1) regarding all types of commodities, (2) as to both improved and unimproved land, (3) by both private and public lessors, and (4) regarding lessees engaged in interstate and foreign commerce as well as those

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[8]Although the Commission has defended the volumetric form of rent as *per se* reasonable and therefore permissible under the Commerce Clause, the Commission also maintains that its status as but one participant in the market for ground leases of the type sought by plaintiff companies for marine terminal sites frees it, as well as its public and private competitors, from application of the Commerce Clause. (See *South-Central Timber Development, Inc. v. Wunnicke* (1984) ... U.S. ..., 104 S.Ct. 2237; *White v. Massachusetts Council of Const. Employers* (1983) ... U.S. ..., 103 S.Ct. 1042; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429; *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794.) The court of appeals rejected this argument, erroneously focusing on but one of several situations in which volumetric rent may be negotiated, i.e., upon *renewal* of a lease where the primary term has expired. In that circumstance, the court said, the Commission has a "monopoly" on the only terminal site adjacent to the company's refinery, and is therefore the only participant in the relevant "market". (App., *infra*, pp. A-5-A-6.) The court ignored that *initial entry* into such leases is entirely discretionary on the part of both the State and the company and that, by contract, future renewal terms can be determined at the outset of the lease. Further, the lease contracts of the Commission expressly provide that any changed rentals upon renewal after expiration of the primary term must be reasonable in amount. The courts are available to resolve any disputes on this score. The court of appeals erred on this point as well.

engaged in intrastate commerce. With particular regard to the plaintiff oil companies, it was established that they are already paying such rent to local ports for leases of unimproved port property (*ante*, p. 5), and that they themselves charge rent of their retail service station lessees based upon the gallons of gasoline pumped on the leased property.[9]

Nor was there any contention below that the challenged regulation, either on its face or in its application, discriminates against these plaintiffs or against interstate or foreign commerce.[10] Indeed, the Commission has employed the volumetric type of rent authorized by the regulation regarding lessees who are neither oil companies nor en-

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[9]In addition to the numerous examples of volumetric rent adduced at the hearings before the Commission, such a form of rental is sufficiently common to warrant extensive discussion in a practice book prepared by the California Continuing Education of the Bar. (Grenert, Ground Lease Practice (Cal.Cont.Ed.Bar 1971), §§ 1.40, 1.41, 2.12-2.14 (discussing variable rent leases based on gross sales as well as "gallonage" rentals of the type used by the plaintiff companies in leasing service station sites).) The Commission follows the practice outlined in this book, deriving a minimum rent that is a percentage of the land's appraised fee value, then applying this minimum against the amounts accruing under the variable rent provisions of the lease. (Clerk's docket item 26, Horn Affidavit, pp. 5-6.)

[10]The decision of the court of appeals did, however, seem to be impliedly based on a perceived *potential* for abuse in the particular context of renegotiation of rent upon renewal of an existing lease for a marine terminal site adjacent to an existing refinery. (See App., *infra*, p. A-6.) Apart from the fact that initial lease contracts can and do remove such potential (see *ante*, fn. 8), such a potential, even if it existed, would be no basis for invalidating a particular form of rent. If bargaining power is indeed unequal, *any* form of rent lends itself to "exaction" of exorbitant compensation by the lessor. Such a perceived potential is not a basis for

gaged in interstate or foreign commerce. (Clerk's docket item 26, Horn Affidavit, pp. 3-4.)

Accordingly, because the challenged form of rent has both a reasonable basis in accepted practice in the ground lease rental market and because it is not employed in a discriminatory fashion, there was no basis for the Ninth Circuit's decision invalidating a regulation that merely authorized its use. If particular rents had been deemed unreasonable, a different question might be presented here; but the reasonableness of particular rents was not an issue below. The court determined that such rents were, *per se*, proscribed by the Constitution.

B. In Negotiating Ground Lease Rental, the States Are Not Limited to Recovery of Their Out-of-Pocket Costs

Where the court of appeals erred was in adopting the apparent premise that, in issuing ground leases to those engaged in interstate or foreign commerce, the States are limited to recoupment of their out-of-pocket costs. Its conclusion under both the Commerce Clause and the Import-Export Clause is grounded on its determination that "there is no correlation between the volumetric rates and benefits conferred by the State. . . ." (App., *infra*, pp. A-9, A-12.) What is apparently meant by this is that a State's rental mode, to survive constitutional scrutiny, must be designed to recover only the costs incurred by the State in making the leased property available for lease and maintaining it for that purpose. The court refers to the "com-

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denying to the State a form of rent that is in common use by others. The State stands ready to justify the reasonableness of rents renegotiated upon lease renewals, should such a challenge be made in future litigation.

pensating" nature of the charge, and cites a "user tax" case, *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707, 715, for the proposition that the "charge on [a] state-provided facility must be designed to help defray its cost." (App., *infra,* p. A-9.) And it adverts to cases involving "user taxes" directed at those making transient use of state highways (*McCarroll v. Dixie Lines* (1940) 309 U.S. 176; *Interstate Transit, Inc. v. Lindsey* (1931) 283 U.S. 183, noting critically that volumetric rents do not vary depending on the " 'wear and tear' from use of the land." (App., *infra,* p. A-9.) In applying this cost-recoupment test, the court found it dispositive that "the lands leased to plaintiffs are unimproved and . . . no services or facilities are provided by the State in conjunction with the lease." (*Ibid.*)

The court misapprehended the applicability of the "user tax" cases. Historically, it appears that "user taxes" were developed in response to early cases of this Court that prohibited "direct" application of general revenue taxes to those engaged in interstate commerce.[11] User taxes were accordingly fashioned to narrowly limit their revenue purpose to recouping state out-of-pocket costs incurred in providing services or facilities that directly benefitted interstate businesses. The cases concerning such taxes have no application to garden-variety ground leases whereby a lessee appropriates to his own exclusive use discrete parcels of state property. In fact, this Court in

[11]These formalistic distinctions in the tax field have since been abandoned by the Court. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609; *Complete Auto Transit v. Brady* (1977) 430 U.S. 274; cf. *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276 (Import-Export Clause).)

Evansville Airport, supra, distinguished between the user tax on transient airport use there at issue and the rent paid by the shops, restaurants, parking concessions, and other "business" users of the airport. (405 U.S. at p. 718.) Ground leases may employ a variety of rental modes, in none of which is the rent limited solely to what is necessary to recoup the lessor's out-of-pocket costs in providing and leasing the property. Rental under variable rent leases is not so limited, and neither is rental under the nonvariable fixed rent leases endorsed by the court of appeals here.

Neither is it significant that the State does not provide services or facilities in addition to raw land. Variable rent leases recognize intensity of use of the leasehold—with or without improvements—as an accepted measure of rental value. The gallonage rent which these plaintiffs charge their own retailers for ground leases is a conspicuous example. Whether the State provides a wharf in addition to the underlying land may go to the amount of the volumetric rate, but not to the propriety of the rental mode itself.[12] Local ports charge volumetric rent for the use of unimproved port land on which the lessees, not the ports, construct wharves; and even where ports do provide a wharf, their volumetric charges exceed what is necessary to obtain a return on the improvements alone, indicating that a volumetric charge is being made on the underlying land as well.[13]

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[12]In fact, the volumetric rents that have actually been negotiated under particular leases have been substantially less in amount than the volumetric charges of local ports. (Clerk's docket item 26, Horn Affidavit, p. 7.)

[13]*Id.*, exh. 1 to Horn Affidavit, p. 9.

The conclusion of the court of appeals that volumetric rent is a "tax" proscribed by the Import-Export Clause in circumstances where the State does not provide "services or facilities" in addition to land proceeds solely and directly from its flawed Commerce Clause analysis, discussed above. Its conclusion on this ground is therefore erroneous for the same reasons. In addition, the court's conclusion on this point completely disregards the clear-cut distinction drawn in numerous cases of this Court between payments made as rent to the States as owners of real property and payments demanded by them solely by virtue of their attempts, as sovereigns, to impose prohibited forms of taxes. (See *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 97-98; *Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 698-699; *Packet Co. v. Keokuk* (1877) 95 U.S. 80, 84-85.)

II. THE QUESTIONS ARE IMPORTANT

Appellants submit that the decision of the court of appeals is so demonstrably wrong as to warrant summary reversal by this Court. At minimum, the decision represents such an apparent misapplication and disregard of Supreme Court precedent that plenary consideration by this Court is necessary, particularly given the importance of the questions both to the State and to local public ports.

The decision invalidates over 30 existing leases of the State Lands Commission. If left standing, the decision will compel the State, now and into the indefinite future, to subsidize the commercial operations of certain of its lessees, because it forecloses use by the State of a type of variable ground lease rent in common use by other lessors,

and by these same plaintiffs, both as lessors and as lessees of local ports. In situations where this widely-accepted volumetric mode of rent would yield a higher rental than other rental modes, the State will be denied the fair rental value of its property.

Further, if the narrow view expressed in the Ninth Circuit's decision is correct, then it is not just the State's rental mode that is constitutionally flawed. Public ports make charges for use of their lands based upon amounts per unit of commodity that are specified in port tariffs or in individual ground leases. These charges of the ports are specifically *not* tied to reimbursement for the cost of providing various other port services or facilities, but are made solely for the use of particular land which may or may not be improved with a wharf provided by the port; ofttimes it is the lessee, not the port, who constructs the wharf on the subject property. And where a wharf is provided, volumetric revenues exceed what is necessary to defray the costs to the port of constructing and maintaining the wharf. Since the ports also ask these charges of persons engaged in interstate or foreign commerce, the decision here renders the local ports vulnerable to constitutional challenges of the type erroneously sustained against the State in this case. (See *Guy v. Baltimore* (1879) 100 U.S. 434.)

CONCLUSION

For these reasons, this Court should either summarily reverse, or note probable jurisdiction and set the case for plenary consideration.

July 3, 1984.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

N. GREGORY TAYLOR
Assistant Attorney General

DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

No. 82-4261
D.C. No. Civ. S-76-513

For Publication
Western Oil and Gas Association, et al.,
Plaintiffs-Appellees,

vs.

Kenneth Cory, et al.,
Defendants-Appellants.

[Filed Jan. 13, 1984]

Appeal from the United States District Court
for the Eastern District of California
Philip C. Wilkins, District Judge, Presiding
Argued and submitted January 11, 1983

OPINION

Before: TANG and ALARCON, Circuit Judges, and TAYLOR,* District Judge.

TANG, Circuit Judge.

The California State Lands Commission ("Commission") and its members appeal from the district court's grant of summary judgment in favor of plaintiffs, eight oil companies and their trade association, the Western Oil and Gas Association. The court below overturned as unconstitutional the regulations promulgated by the Commission that compute "rent" for the leasing of state-owned tidelands and

*Honorable Fred M. Taylor, District Judge for the District of Idaho, sitting by designation.

submerged lands based on the volume of oil in interstate and foreign commerce passing over the leased property. We agree that the regulations violate both the Commerce Clause and the Import-Export Clause of the United States Constitution and affirm.

I. BACKGROUND

In 1953 Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-1343. The Act conveyed to the States title to the land underlying the nation's harbors and seas from the high tide mark to the three-mile limit. In California, the State Lands Commission administers the tidelands and submerged lands and is authorized to lease property upon terms it deems to be in the best interest of the State. Cal. Pub. Res. Code §§ 6216, 6301, 6501-6509.

Plaintiffs own and operate several refineries on the California coast adjacent to the State lands. It is uncontested that "[p]etroleum substances must enter or depart from the facilities through a system of pipelines. Due to the physical and practical immobility of plaintiffs' processing plants, the pipelines must traverse tidal and submerged lands owned by the State." *Western Oil and Gas Ass'n v. Cory,* No. S-76-513, slip op. at 1 (E.D. Cal. Apr. 15, 1982).

Prior to April 28, 1976, the Commission leased the lands for a flat annual rate of six percent of the appraised value of the land. Thereafter, the Commission amended the regulations to allow for an alternative rental calculation based on the volume of commodities passing over the state-owned lands. The new volumetric rate, also known as a throughput charge, was codified in 2 Cal. Admin. Code § 2005 (current version at § 2003):

2005. Payment of Rentals.

(a) ....

(b) Rental Rate Schedule: The following rates shall apply to the classifications listed below:

...

(2) *Industrial Use:* The rental may be based on eight percent (8%) per annum of the appraised value of leased land together with $1\frac{1}{2}$ cents per diameter inch per lineal foot for pipelines and conduits within the leased premises; and/or *an annual rental, with a specified minimum, based upon the volume of commodities passing over State land.* The minimum rental under either of these alternative rentals shall not be less than $550 per annum.

(3) *Right of Way Use:* Eight percent (8%) per annum of the appraised land value, together with damages, if any; and/or for pipelines and conduits, $1\frac{1}{2}$ cents per diameter inch per lineal foot per annum, or, in lieu of either of the foregoing, *an annual rental, with a specified minimum based upon the volume of commodities passing over State land.* The minimum rental under any of the above alternatives shall not be less than $100 per annum (emphasis added).

The regulations do not set specific volumetric rates, but leave these rates subject to negotiation upon renewal of individual leases. Since the regulations were adopted, the Commission has, with each lease renewal, appraised the land, set a minimum annual rent of eight percent of the appraised value, and added an additional charge based on the volume of commodities passing over the leased land.

In September 1976, plaintiffs commenced the present action challenging the validity of the volumetric charges

under the Commerce Clause, the Import-Export Clause and the Duty of Tonnage Clause of the United States Constitution. Plaintiffs also contended that the charges violated a variety of state laws. The district court stayed the federal proceedings to allow for litigation of the state law issues in the California courts. The Sacramento County Superior Court subsequently upheld the volumetric rates and the decision was affirmed on appeal. *Western Oil and Gas Ass'n v. California State Lands Comm'n,* 105 Cal. App. 3d 544, 164 Cal. Rptr. 468 (1980).

In 1981, the parties returned to federal district court seeking adjudication of the federal constitutional claims. The trial court held that the volumetric throughput charge placed a burden on interstate and foreign commerce and that the assessments violated the Commerce, the Import-Export and the Duty of Tonnage Clauses. The court therefore granted Western Oil's motion for summary judgment and enjoined the Commission from assessing and collecting rent based on the volume of commodities in interstate and foreign commerce passing over tide and submerged lands. The Commission appeals timely.[1]

II. COMMERCE CLAUSE

The Commerce Clause provides that Congress has the power "To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. It is a limitation upon the power of the States and reflects the Framers' concern that the tendencies of the States towards economic Balkanization had to be avoided. *Hughes v. Oklahoma,* 441 U.S.

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[1]The district court granted, for good cause, the Commission's "protective motion" for retroactive extension of time for filing a notice of appeal pursuant to Fed. R. App. P. 4(a)(5).

322, 325-26 (1979); *Freeman v. Hewit,* 329 U.S. 249, 252 (1946). Under the Clause, "[a] State is . . . precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Id.*

A. *Applicability of the Commerce Clause*

It is undisputed that up to 95% of the petroleum substances entering the oil companies' facilities are of foreign origin and that between 46-98% of the products leaving the refineries are channeled into interstate and foreign commerce. There is, therefore, no question that plaintiffs' activities are carried out in interstate commerce. *See, e.g., Maryland v. Louisiana,* 451 U.S. 725, 755-56 (1981); *Michigan Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 169-70 (1954).

The State contends, however, that its leasehold activities fall outside the reach of the Commerce Clause, because it carries on a proprietary function when it leases tide and submerged lands. Moreover, the State maintains that it is merely one of many participants in the market competing for leases.

When a state acts as a market participant, rather than a market regulator, it is said to act in a proprietary capacity and is not subject to the limitations of the Commerce Clause. *See White v. Massachusetts Council of Const. Employers,* 103 S. Ct. 1042, 1044 (1983); *Reeves, Inc. v. Stake,* 447 U.S. 429, 436, 439 (1980). The United States Supreme Court has, therefore, on several occasions held a state's participation in the market place as a competitor to be shielded from the Commerce Clause. *See, e.g., White,* 103

S.Ct. at 1048 (contracting for construction of public projects); *Reeves*, 447 U.S. at 440 (selling of cement); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-810 (1976) (recycling of automobiles).

Yet in the case at bar, California's role cannot be said to be one of a market participant. The State owns and controls tidelands and submerged lands in its sovereign capacity. *See Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 320 (1973); *Shively v. Bowlby*, 152 U.S. 1, 58 (1894); *California v. United States*, 512 F. Supp. 36, 40 (N.D. Cal. 1981) (citing *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892)). Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs' facilities does not permit them to "shop around". There is no other competitor to which they can go for the rental of the required strip of California coastline. The Commission has a complete monopoly over the sites used by the oil companies. The companies have no choice but to renew their leases despite the volumetric rate, as the oil, gas and petroleum-derived products cannot be transported to plaintiffs facilities without traversing the state-owned lands. This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce. We therefore reject the State's contention that its leasing activities are not subject to Commerce Clause scrutiny.

B. *Volumetric Rate*

Plaintiffs do not dispute the State's right to the reasonable rental value of its property. They contend, however, that the computation of rent based on the volume of com-

modities passing through its pipelines bears no relationship to any benefit conferred by the State and that such a charge is unconstitutional.

The State argues that there is nothing unreasonable about its volumetric leases; they are a common rental mode used by other lessors. Moreover, it contends that the reasonableness of the volumetric rates have been determined in the related state court litigation; therefore, the parties are precluded by the doctrine of collateral estoppel from relitigating that issue.

A. *Reasonableness of the Volumetric Rates*

Our consideration of the reasonableness of the volumetric rates is not precluded by the state court litigation. The state proceedings addressed whether the throughput regulations were unreasonable, arbitrary and capricious "as an attempt to extract exorbitantly high charges for the use of state land. . . ." *Western Oil,* 105 Cal.App.3d at 560, 164 Cal.Rptr. at 471. This is a different inquiry from determining whether an assessment is reasonable for Commerce Clause purposes. The California court was not faced with the question whether the volumetric rates placed a burden on interstate commerce. Rather, they simply reviewed the Commission's promulgation to determine whether that agency was arbitrary, unreasonable, or capricious in adopting that rental mode. As the California Court of Appeals acknowledged, the State trial court was not requested to review the federal constitutional claims pending in federal court. *Id.* Moreover, under the abstention doctrine, a litigant should not be denied the right to have his claims fully litigated upon return to federal court. *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 421 (1964).

B. *Relation Between State Benefits Conferred and Volumetric Rates*

The district court below held that because the throughput charge is not regulatory in nature, its reasonableness is of no concern. The court then, however, went on to determine that there was no relation between the throughput charge and services and benefits provided by the State. This is the proper constitutional inquiry under the present facts, as our discussion will show.

Although the volumetric rates are designated as "rent" by the State, it is the practical effect of an exaction, not its label that is the focus of analysis under the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 615 (1981); *Complete Auto Trasit, Inc. v. Brady,* 430 U.S. 274, 279 (1977); *Nippert v. Richmond,* 327 U.S. 416, 431 (1946). The volumetric charges are exacted specifically in return for the use of the coastal property. The present case therefore falls within the bounds of the Supreme Court cases that have reviewed "challenges to 'user' fees or 'taxes' that were designed and defended as a specific charge imposed by the State for the use of state-owned . . . facilities and services." *Montana,* 453 U.S. at 621. *See also St. Louis v. Western Union Tel. Co.,* 148 U.S. 92, 97 (1893) (rent "is not graduated by the amount of the business, nor . . . fixed for the privilege of doing business.").

California does have the right to exact compensation for conferring upon plaintiffs the right to use the real estate in question. *Id.* at 99. Further, the charges need only be a fair, not an exact approximation of the use of the land. *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 716-17 (1972). Yet these "user"

charges cannot be disproportionate to the benefits conferred by the State. *Montana,* 453 U.S. at 622 n.12; *Vanderburgh,* 405 U.S. at 714.

In applying the above principles to the case at bar, we find that the throughput charge is not directed toward compensating the State for the use of the land and violates the Commerce Clause. It is undisputed that the lands leased to plaintiffs are unimproved and that no services or facilities are provided by the State in conjunction with the lease. Plaintiffs must perform all operations that are required to make use of the land, such as dredging operations and installation and maintenance of the pipeline system. While under the pre-1976 leasing system, there was a correlation between the annual rental and the land's appraised value, a similar correlation is lacking under the present mode. Payments to the State now vary depending on the volume of petroleum substances travelling in interstate commerce, not on the "wear and tear" from use of the land. The United States Supreme Court has held a similar "compensating" charge to be violative of the Commerce Clause, because it was proportioned solely to the earning capacity of a vehicle, not the wear and tear caused by the vehicle incident to use of the state highways. *Interstate Transit, Inc. v. Lindsay,* 283 U.S. 183, 190 (1931). In that case, as in the case at bar, there was no sufficient relation between the measure employed and the extent of the use of the state property. *Id. See also Vanderburgh,* 405 U.S. at 714 (charge on state-provided facility must be designed to help defray its cost) (citing *Lindsay*); *McCarroll v. Dixie Greyhound Lines,* 309 U.S. 176, 180 (1940) (toll on amount of gasoline over 20 gallons in carrier's tank in return for road use invalidated).

The volumetric rates are also not justifiable as a means of compensating the State for environmental damage caused by the flow of plaintiffs' petroleum substances over the tide and submerged lands. Under both their leases and various state statutes, plaintiffs are held accountable for environmental damage resulting from their operations. The leases provide for the posting of a surety bond, the acquisition of public liability insurance for property damage, and requires plaintiffs to have an oil spill contingency plan. State statutes, in turn, provide for oil spill contingency plans and civil liability for environmental damage. *See, e.g.,* Cal. Gov't Code § 8574; Cal. Harb. & Nav. Code § 151; Cal. Water Code § 13350. It is also noteworthy that the administrative provisions do not require throughput charges to be related to services or facilities provided. *See* Cal. Admin. Code § 2005.

We are of the opinion that the volumetric rates are a disguised revenue raising measure. The rates do not reflect the value to the State of its land, but the maximum amount of revenue California can extract from interstate commerce by utilizing its strategic geographic position. There is no correlation between benefits conferred by the State and the throughput charges. We therefore hold that the charges impose an undue burden on interstate commerce and are violative of the Commerce Clause.

III. IMPORT-EXPORT CLAUSE

One of the major defects in the Articles of Confederation, and an impetus for the Constitutional Convention of 1787, was that the Articles allowed individual states to burden commerce among themselves and with foreign countries. *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 283 (1976);

see also 1 W. Crosskey, *Politics and the Constitution in the History of the United States,* 295-323 (1953). "Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States." *Michelin* at 283. The founding fathers sought to limit state power to tax foreign commerce by absolute proscription announced in Article I, § 10, cl. 2 of the Constitution: "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ."

The term "impost or duty" is not self-defining, however, and not every state assessment that burdens foreign commerce is prohibited by the Clause. Although the constitution forbids the states from exploiting their position to the detriment of foreign commerce, they are entitled to compensation for services or property they provide. *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 286-94 (1976); *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 315-20 (1851). In recent cases, the Supreme Court has focused the Import-Export analysis on whether a challenged exaction offends the policy considerations that underlie the Clause. *Department of Revenue v. Ass'n. of Washington Stevedoring Cos.,* 435 U.S. 734, 752-53 (1978); *Michelin,* 423 U.S. at 285-86. These policies are:

> [T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the

> States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

Id. (footnotes omitted).

We focus our analysis on the third Import-Export policy, namely whether the volumetric rates disturb the harmony among the States. The Supreme Court has held that such harmony is not disturbed if a coastal jurisdiction "receive[s] compensation only for services and protection extended to the imports." *Stevedoring,* 435 U.S. at 753. The High Court has, therefore, upheld a nondiscriminatory ad valorem property tax on imported tires stored in a Georgia warehouse, because the tax was the *quid pro quo* for benefits actually conferred by the state. *Michelin,* 423 U.S. at 288-90.

As our analysis under the Commerce Clause has shown, there is no correlation between the volumetric rates and benefits conferred by the State as required by *Michelin.*[2] We therefore come to the inevitable conclusion that the volumetric rates are not exacted in return for the use of the tide and submerged lands, but as "a form of tribute . . . to the disadvantage of the other States." *Michelin* at 286. California is exploiting its favorable geographic situation to exact a transit fee from the goods in question. It is "levying . . . on citizens of other States by taxing goods

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[2] "[T]he desire (under the third Import-Export policy) to prevent interstate rivalry and friction does not vary significantly from the primary purpose of the Commerce Clause." *Stevedoring,* 435 U.S. at 754.

merely flowing through their ports to the other states not situated as favorably geographically." *Id.* 285-86.

In calculating the value of the leaseholds, therefore, California cannot be permitted to rely on a rental formula that exploits its control over the crucial tidelands. "[A]s it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form." *License Cases,* 46 U.S. (5 How.) 504, 576 (1847).

We also note that although the state regulations do not, by their terms, single out imported goods for assessment, this is the inevitable result. As previously stated, up to ninety-five of the crude oil entering California was in foreign commerce, and the evidence suggests that this estimate could have been higher. A charge that is nondiscriminatory on its face may well have the effect of discriminating against foreign goods, and the Supreme Court has made clear that it is "[n]ot the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts [that] are our concern." *Nippert,* 327 U.S. at 431.

IV. CONCLUSION

Today we hold that the volumetric throughput charge used by the California Lands Commission in the rental of tide and submerged lands is unconstitutional under the Commerce Clause and the Import-Export Clause. Our holding is not, however, to be understood as invalidating all volumetric leases. We recognize that the volumetric rate must be judged by its result, not its formula. *Vanderburgh* at 716.

AFFIRMED.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

No. 82-4261
D.C. No. Civ. S-76-513

Western Oil and Gas Association, et al.,
Plaintiffs-Appellees,

vs.

Kenneth Cory, et al.,
Defendants-Appellants

[Filed Feb. 29, 1984]

ORDER AMENDING OPINION

Before: TANG and ALARCON, Circuit Judges, and TAYLOR,* District Judge.

The opinion is hereby amended and the cite to *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973) on page 202 of the slip opinion is deleted.

*Honorable Fred M. Taylor, District Judge for the District of Idaho, sitting by designation.

Appendix C

United States District Court
for the
Eastern District of California

Civil Action File No. 76-513 PCW

Western Oil and Gas Association, et al

vs.

Kenneth Cory, et al

[Filed Mar. 30, 1982]

JUDGMENT

This action came on for (hearing) before the Court, Honorable PHILIP C. WILKINS, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Judgment be and is hereby entered against Plaintiffs and in favor of Defendants on Plaintiff's Second Claim on grounds of res judicata.

Dated at Sacramento, California, this 30th day of March, 1982.

James R. Grindstaff
Clerk of Court

[Entered Mar. 30, 1982]

Appendix D

United States District Court
for the
Eastern District of California

Civil Action File No. CR S-76-513 PCW

Western Oil & Gas Association, et al

vs.

Kenneth Cory, et al

[Filed April 16, 1982]

AMENDED JUDGMENT

This action came on for (hearing) before the Court, Honorable PHILIP C. WILKINS, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that Judgment be and is hereby ENTERED pursuant to the terms and conditions of the Court's Memorandum and Order filed April 15, 1982, a certified copy of which is attached hereto and incorporated herein by reference.

Dated at Sacramento, California, this 16th day of April, 1982.

James R. Grindstaff
Clerk of Court

[Entered April 16, 1982]

In the United States District Court
For the Eastern District of California

Civ. No. S-76-513 PCW

Western Oil and Gas
Association, et al.,
Plaintiffs,

v.

Kenneth Cory, et al.,
Defendants.

[Filed April 15, 1982]

AMENDED MEMORANDUM AND ORDER

The plaintiffs in this action are several oil companies and their trade organization. Defendants are the California State Lands Commission, its chairman, and two former members of the Commission [hereinafter SLC]. The SLC has exclusive jurisdiction over all tidelands and submerged lands owned by the State of California. It has power to lease such lands upon terms and conditions it deems to be in the best interests of the State. The SLC is authorized to promulgate rules and regulations to this effect. This action challenges the constitutional validity of one such regulation.

Plaintiffs own several oil and gas processing plants located on or near the coast of California. The amount of capital invested in these facilities is substantial. Petroleum substances must enter or depart from these facilities through a system of pipelines. Due to the physical and practical immobility of plaintiffs' processing plants, the pipelines must traverse tidal and submerged lands owned

by the State. Up to ninety-five percent (95%) of the petroleum substances entering the facilities are of foreign origin. From forty-six to ninety-eight percent (46-98%) of the petroleum products leaving the facilities are channeled into interstate and foreign commerce. These products remain in such commerce until they reach the ultimate consumer. *See, e.g., Maryland v. Louisiana,* 101 S.Ct. 2114, 2134 (1981). Plaintiffs lease from the State the tidal and submerged lands over which their pipelines must pass. The lands are unimproved, and the State provides no services or facilities to the lessees. Accordingly, plaintiffs must perform their own dredging operations, install their own pipelines, maintain their own pipeline systems, and perform any other operations necessary to make effective use of the lands. In addition, plaintiffs are held accountable both under the terms of their leases and by various state statutes for any environmental damage resulting from their operations. *See, e.g.,* Harbors & Navigation Code § 151; Government Code § 8574.1 *et seq.*

Prior to the commencement of this litigation, the SLC leased these lands at an annual rate based on 6% of the appraised value of the land. In 1975, the SLC decided to reconsider the manner in which rent was determined. In 1976, after extensive public hearings, the SLC promulgated the following regulation, which is the subject of this lawsuit.

> (2) Industrial Use: The rental may be based on eight percent (8%) per annum of the appraised value of leased land together with 1½ cents per diameter inch per lineal foot for pipelines and conduits within the leased premises; and/or an annual rental, with a specified minimum, based upon the volume of commod-

ities passing over State land. The minimum rental under either of these alternatives shall not be less than \$550 per anum.

(3) Right of Way Use: Eight percent (8%) per annum of the appraised land value, together with damages, if any; and/or for pipelines and conduits, 1½ cents per diameter inch per lineal foot per annum, or, in lieu of either of the foregoing, an annual rental, with a specified minimum, based upon the volume of commodities passing over State land. The minimum rental under any of the above alternatives shall not be less than \$550 per annum.

2 Cal. Admin. Code §§ 2005(b)(2) and 2005(b)(3).

In determining which rental assessment allowed by these subsections would best further the State's interests, the SLC must consider environmental factors, revenue potential, competitive effects, value assessment data, and other facts which the SLC finds to be relevant. *See* 2 Cal. Admin. Code § 2005(h). In each instance since the above-quoted provisions were adopted, upon renewal or assignment of a plaintiff's lease, the SLC has appraised the land, and has set a minimum rental of eight percent (8%) of the appraised value. Pursuant to the challenged Administrative Code provisions, however, the SLC has also imposed an additional charge at a progressive rate based *solely* on the volume of commodities passing over the leased lands, including commodities in interstate and foreign commerce. This charge is not based on the value of the commodities upon entering or exiting plaintiffs' facilities. This additional payment is referred to as a "volumetric throughput charge." As a result of this additional charge, the plaintiffs now pay up to approximately thirty percent (30%) of the appraised value of the leased lands as rental to the State.

On September 27, 1976, plaintiffs filed this action challenging the validity of California Administrative Code § 2005 on various state and federal grounds. Jurisdiction is predicated upon 28 U.S.C. § 1331. In 1977, plaintiffs moved for summary judgment without success and the Court stayed the action to allow state law issues to be litigated in state court. Plaintiffs subsequently filed suit in Sacramento County Superior Court and reserved the federal constitutional grounds for decision in this Court under the doctrine of *England v. Louisiana State Bd. of Med. Examiners,* 84 S.Ct. 461 (1964). The Superior Court upheld the Administrative Code provision on state law grounds, and the decision was affirmed on appeal. *See Western Oil & Gas Ass'n v. State Lands Commission,* 103 Cal. App. 3d 554 (3d Dist. 1980), *hearing denied,* 3 Civ. 18577 (Cal. S.Ct. July 2, 1980). The parties then returned to this Court with cross-motions for summary judgment. Oral arguments were heard on February 2, 1981, in this Court, the Honorable Philip C. Wilkins, presiding. After the hearing the parties submitted additional written arguments, the last of which was filed with the Court on July 29, 1981. The Court has considered all of the written and oral arguments of the parties and the exhibits filed in this action. Summary judgment is appropriate as the material facts are not in dispute.

Plaintiffs' challenge to the volumetric throughput charge is based upon three distinct but interrelated provisions of the Federal Constitution. Article I, Section 8, Clause 3 provides in pertinent part that "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States . . ." (hereinafter Commerce Clause). Article I, Section 10, Clause 2 provides that "No State shall, without the Consent of Congress, lay any

Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; . . . " (hereinafter Import-Export Clause). Finally, Clause 3 of the latter article and section reads as follows: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, . . ." (hereinafter Duty of Tonnage Clause).

These constitutional provisions were designed to promote and ensure harmony both amongst the several states, and between the states and the federal government. Power to control commerce between the states was reserved to the federal government to protect interstate movement of goods from local trade barriers and thus to prevent interstate friction likely to result from retaliatory measures. *See H.P. Hood & Sons v. DuMond,* 69 S.Ct. 657, 665 (1949). In addition, the states were prohibited from levying "imposts or duties" on imports or exports in order to permit uniform federal regulation of foreign relations, to protect federal revenues derived from imports, and to maintain harmony among the inland states and the seaboard states. *See Washington Revenue Department v. Ass'n of Washington Stevedoring Companies,* 98 S.Ct. 1388, 1405 (1978) (Powell, J., concurring); *see also, Youngstown Sheet & Tube Co. v. Bowers,* 79 S.Ct. 383, 395 (1959) (Frankfurter, J., dissenting). Since this prohibition could be nullified by charging commercial vessels for the privilege of access to the ports of a state, the states were further prohibited from leving any "duty of tonnage" having such an effect. *See Clyde Mallory Lines v. Alabama,* 56 S.Ct. 194, 196 (1935). In reliance upon this constitutional scheme, plaintiffs argue that the volumetric throughput charge is the type of evil that the clauses, collectively, were designed to prevent.

Initially, the Court notes that the SLC has advanced several arguments concerning the reasonableness of the throughput charge. *See* Defendants' Opening Brief, pp. 20-29, *see also* Defendants' Reply Brief, pp. 3-7. Consideration of whether a charge is "rational" is of concern when Commerce Clause, equal protection or due process challenges are lodged against state regulatory activity. *See, e.g., Kassell v. Consolidated Freightways Corp.,* 101 S.Ct. 1309 (1981); *Minnesota v. Clover Leaf Creamery Co.,* 101 S.Ct. 715 (1981); *Cities Services Gas Co. v. Peerless Oil & Gas Co.,* 71 S.Ct. 215 (1950). In the present case, however, the disputed throughput charge is not regulatory in nature, nor has either party attempted to characterize it in such a fashion. Thus, the "reasonableness" of the throughput charge is of no particular concern to the Court as this action has been framed.

It is undisputed that the State leases unimproved lands and furnishes no services or facilities to the plaintiffs, nor is the State obligated to do so. There is no language in the administrative provision requiring the throughput charge to be related to services or facilities provided. *See* Cal. Admin. Code § 2005. Thus, there is no argument that the throughput charge is exacted as compensation for the provision of services or facilities. *Cf., Washington Revenue Department v. Ass'n of Washington Stevedoring Companies, supra; Clyde Mallory Lines v. Alabama, supra.* Nor is it argued that the charge is based on the value of the commodities involved. *Cf., Commonwealth Edison Co., v. Montana,* 101 S.Ct. 2946 (1981) (variable rate coal severance tax based on value, energy content, and extraction method used). The SLC's primary argument has been that the use of a volumetric throughput charge does not implicate any

of the aforementioned constitutional provisions. The SLC has consistently argued that the State is acting in its "proprietary" capacity as a landowner in charging a "rental," rather than as a sovereign in assessing a tax, impost or duty. *See* Defendants' Opening Brief, pp. 12-33; *see also,* Defendants' Reply Brief, pp. 1-3. Thus, the SLC contends that this "proprietary activity" is outside the scope of the Commerce, Import-Export and Duty of Tonnage clauses. Accepting the SLC's characterization of the State's activity as true, however, it is also true that bold assertions of state proprietary power, in name or effect, are not impervious to constitutional attack. *See, e.g., City of St. Petersburg v. Alsup,* 238 F.2d 830 (5th Cir. 1956); *Haskell v. Cowham,* 187 F. 403 (8th Cir. 1911). In a few cases, the sovereign-proprietary distinction has been rejected altogether as a tenable basis for analysis. *See New York v. United States,* 66 S.Ct. 310, 312-314 (1946); *Massachusetts v. United States,* 98 S.Ct. 1153, 1162 & n.14 (1978).

The recent Commerce Clause decisions in which state assertions of proprietary power *were* upheld involved state competition in the marketplace for fungible goods. *See, e.g. Reeves v. Stake,* 100 S.Ct. 2271 (1980); *Hughes v. Alexandria Scrap Corp.,* 96 S.Ct. 2488 (1976); *American Yearbook Co. v. Askew,* 339 F. Supp. 719 (M.D.Fla. 1972). A comparable specific immunity for state participation in the marketplace, however, is not appropriate herein since there is no analogous competitive marketplace involved in this case. "Moreover, any general immunity for proprietary action could well exacerbate trade barriers of serious and growing significance." L. Tribe, *American Constitutional Law* 336-337 (1978).

A fundamental purpose of the Commerce, Import-Export and Duty of Tonnage clauses, collectively, is to prevent interstate friction that results from a state using its geographic location to erect trade barriers. The Court has determined that the State's imposition of the throughput charge is such a trade barrier and constitutes " . . . the kind of action with which the [clauses are] concerned." *Hughes v. Alexandria Scrap Corp., supra.* Because the volumetric throughput charge places a burden on interstate and foreign commerce that cannot be justified under the facts of this case, the Court finds that the SLC's assessment of "rent" based on the volume of commodities in interstate and foreign commerce passing over the State's tidal and submerged lands is invalid. Accordingly,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment be, and the same hereby is, GRANTED as to plaintiffs' second claim on the ground of res judicata. *See* Order of March 30, 1982. In all other respects, defendants' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants are hereby enjoined from assessing and collecting rent based on the volume of commodities in interstate and foreign commerce passing over tidal and submerged lands in reliance upon California Administrative Code §§ 2005(b)(2) and 2005(b)(3). This amended memorandum and order shall serve as the Court's findings of fact and conclusions of law in support of this injunction. F.R.Civ.P. 52(a) and 65(d).

IT IS FURTHER ORDERED that the Clerk of the Court enter an amended judgment in conformity with the foregoing.

DATED: April 14, 1982

/s/ Philip P. Wilkins
United States District Judge

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-4261
DC# Civ. S-76-513

WESTERN OIL and GAS ASSOCIATION, ET AL.,
Plaintiffs-Appellees,

vs.

KENNETH CORY, ET AL.,
Defendants-Appellants,

[Filed April 6, 1984]

ORDER

Before: TANG and ALARCON, Circuit Judges, and
TAYLOR,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Fred M. Taylor, District Judge for the District of Idaho, sitting by designation.

Appendix F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-4261
DC No. Civ. S-76-513

WESTERN OIL & GAS ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

KENNETH CORY, et al.,
Defendants-Appellants.

[Filed April 10, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

John K. Van De Kamp,
Attorney General
of the State of California
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
6000 State Building
San Francisco, California
94102
Telephone: (415) 557-3650
Attorneys for Appellants
Kenneth Cory, et al.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-4261
DC No. Civ. S-76-513

WESTERN OIL & GAS ASSOCIATION, et al.,
Plaintiffs-Appellees,

v.

KENNETH CORY, et al.,
Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff, members of the California State Lands Commission, hereby appeal to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this action on January 13, 1984. The Court of Appeals denied appellants' petition for rehearing on April 6, 1984.

This appeal is taken pursuant to 28 United States Code section 1254(2).

DATED: April 10, 1984

John K. Van De Kamp
Attorney General
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
Attorneys for Appellants
Kenneth Cory, et al.

Appendix G

CURRENT SECTIONS 1900, 2000, 2002, 2003, and 2004 OF TITLE 2, CALIFORNIA ADMINISTRATIVE CODE

Article 1. General Provisions

1900. Definitions.

The following definitions shall apply to this Chapter unless otherwise provided.

(a) The term "applicant" includes any person who files an application under these regulations.

(b) The term "person" includes any individual, firm, partnership, business entity, business trust, association, corporation, or governmental entity or agency.

(c) The term "lease" includes a permit, right-of-way, easement, license, compensatory agreement, or other entitlement of use.

(d) The term "structure" means any manmade construction.

(e) The term "submerged lands" means the area lying below the elevation of ordinary low water in the beds of all tidal and nontidal navigable waters.

(f) The term "tidelands" means the area lying between the elevations of ordinary low water and ordinary high water on lands subject to tidal action.

(g) The term "uplands" shall mean lands bordering on navigable waterways.

(h) The term "school lands" refers to all Sections 16 and 36 granted to the State for the benefit of common schools by Chapter 145 of the Federal Statutes of 1853.

(i) The term "lieu or indemnity lands" refers to those lands acquired by the State in place of school lands it previously acquired or school lands to which it did not receive title because they were either mineral in character, had not been sectionalized, or were subject to prior established rights.

(j) The terms "merchandise", "product" and "commodity" are interchangeable and shall include, goods, wares, chattels, personal property of every description, cargo, freight, mail, vessel's stores and supplies, articles, matter and material.

* * * *

Article 2. Leasing or Other Use of Public Lands

2000. General.

(a) This article applies to the leasing of all lands under the Commission's jurisdiction for all surface uses except the exploration for or extraction of natural resources including minerals, oil, gas or other hydrocarbons, or geothermal resources or any other natural resources, excluding timber.

(b) Leases or permits may be issued to qualified applicants and the Commission shall have broad discretion in all aspects of leasing including category of lease or permit and which use, method or amount of rental is most appropriate, whether competitive bidding should be used in awarding a lease, what term should apply, how rental should be adjusted during the term, whether bonding and insurance should be required and in what amounts, whether an applicant is "qualified", etc. based on what it deems to be in the best interest of the State.

(c) Leases or permits for tide or submerged lands shall generally only be issued to riparian or littoral upland owners or use right holders, provided however that such leases or permits may be granted to the best qualified applicant irrespective of riparian or littoral status.

(d) Leases or permits for school, lieu or indemnity lands shall be for value or value enhancement purposes.

* * * *

2002. Categories of Leases or Permits.

(a) General Lease: Uses may include the following:

(1) Commercial: Income producing uses such as marinas, restaurants, clubhouses, recreation piers or facilities, docks, moorings, buoys, helicopter pads, decks or gas service facilities.

(2) Industrial: Uses such as oil terminals, piers, wharves, warehouses, stowage sites, moorings, dolphins and islands; together with necessary appurtenances.

(3) Right of Way: Uses such as roadways, power lines, pipelines or outfall lines, except when used only as necessary appurtenances.

(b) General Permit: Uses may include the following:

(1) Public agency uses such as public roads, bridges, recreation areas or wildlife refuges having a statewide public benefit;

(2) Public Resources Code Section 6321 protective structures such as groins, jetties, sea walls, breakwaters and bulkheads;

(3) Non income producing uses such as piers, buoys, floats, boathouses, docks, waterski facilities, and camp-

sites not qualifying for a private recreational pier permit under 2002(f). Other uses may include campsites, cabins, dwellings, arks, houseboats, or boathouses provided that when such uses are located on sovereign lands that such uses are not found to be inconsistent with public trust needs.

(c) Grazing Lease: Use includes the feeding of livestock on forage.

(d) Agricultural Lease: Uses may include farming, silviculture and horticulture.

(e) Forest Management Agreement: Uses may include reforestation, improvement of timber growth and soil productivity, vegetation control, reduction of fire and erosion hazards, insect or disease control or any other use that enhances the value of lands subject to the agreement.

(f) Private Recreational Pier Permit: Use is limited to any fixed facility for the docking or mooring of boats constructed for the use of the littoral landowner, as specified in Public Resources Code Section 6503.5, and does not include swimming floats or platforms, sun decks, swim areas, fishing platforms, residential, recreational dressing, storage or eating facilities or areas attached or adjacent to recreational piers, or any other facilities not constructed for the docking or mooring of boats.

(g) Salvage Permit: Use includes the salvage of all abandoned property over and upon ungranted tide and submerged lands of the State which property belongs to the State and is under the Commission's jurisdiction pursuant to Public Resources Code Section 6309. The Commission may retain or sell any or all salvaged property or may allow the permit applicant to retain it.

2003. Rental.

(a) Rental for the various categories of use shall be generally as follows:

(1) Commercial Use: An annual rental based on any one or combination of the following rental methods, with a minimum rental of $250:

(A) A percentage of annual gross income (the percentage being based on an analysis of the market for like uses and other relevant factors);

(B) 9% of the appraised value of the leased land;

(C) The volume of commodities passing over the lease premises.

(2) Industrial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

(A) 9% of the appraised value of the leased land together with 2¢ per diameter inch per lineal foot of pipelines and conduits on the leased premises;

(B) The volume of commodities passing over the lease premises.

(3) Right-of-Way Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $100:

(A) 9% of the appraised value of the leased lands, together with compensation for any damage caused to such lands;

(B) 2¢ per diameter inch per lineal foot;

(C) The volume of commodities passing over the leased premises.

(4) General Permits: Annual rental shall be based on 9% of the appraised value of the leased lands with a minimum rental of $50.

(A) No rental shall be charged for public agency use of tide and submerged lands if the Commission at its sole discretion, determines that a statewide public benefit accrues from such use.

(B) Monetary rental for Public Resources Code Section 6321 protective structures may be waived if the Commission determines that a public benefit accrues from the installation of such structures.

(5) Private Recreational Pier Permits: Pursuant to Public Resources Code Section 6503.5 a rent free permit shall be used to those applicants demonstrating their qualifications under that section as implemented by 2002(f).

(6) Grazing: An annual rental based on appraised value for the intended use.

(7) Agricultural: An annual rental based on any one or a combination of the following rental methods with a minimum rental of $250:

(A) A percentage of annual gross income (the percentage being based on analysis of the market for like uses and other relevant factors);

(B) 9% of appraised value of the leased lands.

(8) Forest Management Agreements: Rental shall constitute enhancement of the land's value resulting from the use.

(9) Salvage Permit Rental shall be as follows:

(A) A rental of $25.00 per annum per acre, computed on a whole or fractional basis, for the total acreage of the permit area; and

(B) 25% of the net salvage value up to $25,000 and 50% of all such value over that amount for all salvaged property the salvor is permitted to retain; or

(C) The net salvage value of any property the State retains less any rental to which it is entitled; and

(D) Such other consideration as may be deemed by the Commission to be in the best interest of the State.

(b) The following factors shall be considered by the Commission in determining which rental method should apply:

(1) The amount of rental the State would receive under various rental methods;

(2) Whether relevant, reliable and comparable data is available concerning the value of the land proposed to be leased;

(3) Whether a particular method or amount of rental would effectively cause an applicant to use more competitive substitute land or to abandon its project altogether;

(4) Whether the land proposed to be leased has been classified as environmentally significant pursuant to Public Resources Code Section 6371.

(5) The monetary value of actual or potential environmental damage anticipated from an applicant's proposed use to the extent such damage is quantifiable;

(6) Other factors relating to the appropriateness of the proposed rental method.

(c) The following limitations shall apply to rental based on the volume of commodities passing over State lands:

(1) Rental shall not be imposed more than once for the identical commodity passing over the same State land if the ownership of that commodity has not changed.

(2) The rental rate for a right-of-way for passage of a commodity across State lands shall be made proportional to the percentage of the total length of the pipeline or conduit that such right-of-way comprises. For the purposes of this section, the total length of a pipeline or conduit shall be the length of the pipeline or conduit between two facilities, uninterrupted by another facility. "Facility" includes terminal, production, storage, refining, manufacturing, processing, mixing or intermixing facilities.

(d) Rental adjustment during the lease term shall be provided for as appropriate.

2004. Term.

(a) The term for leases and permits including any optional renewal periods shall be no longer than necessary to accomplish the intended use or purpose.

(b) The term shall be limited according to standard commercial practices with maximum terms as follows:

(1) General Lease General Permit Forest Management Agreement	49 years
(2) Agricultural Lease	25 years
(3) Grazing Lease Private Recreational Pier Permit General Permit Recreational Use	10 years
(4) Salvage Permit	1 year but extendable for one additional year.

Appendix H

FORMER SECTIONS 2006 AND 2007 OF TITLE 2, CALIFORNIA ADMINISTRATIVE CODE*

2006. Payment of Rentals.

(a) Amount: Leases executed pursuant to this Article shall contain provisions for the payment of rental based upon the rates established by the following schedule in fixed sums, in sums based in whole or in part on gross income, volume or quantity of materials passing over State lands, or for such other consideration as, in the judgment of the Commission, may be in the best interests of the State.

(b) Rental Rate Schedule: The following rates shall apply to the classifications listed below:

(1) Commercial Leases: A percentage, as provided in Section 2007, of annual gross income, and/or 8% per annum of the appraised value of the leased land, with a $450 minimum annual rental.

(2) Industrial Lease: Eight percent per annum of the appraised value of leased land together with 1½ cents per diameter inch per lineal foot for pipelines and conduits within the leased premises; or, an annual rental, with a specified minimum, based upon the volume of commodities passing over State land. The minimum rental under either of these alternative rentals shall be not less than $450 per annum.

(3) Use Permits: A fixed rental of $75 per annum for areas less than 1,000 square feet, and $100 per annum for areas of 1,000 square feet to 3,000 square feet.

(4) Grazing and Agricultural Leases: Rental based on appraisal for the use intended.

*Cal. Admin. Register 76, No. 18, 6-1-76.

(5) Public Agency Leases: Leases of State land to public agencies shall provide for monetary rental, unless the Commission determines that a state-wide public benefit accrues, equal to that prescribed for other leases and permits according to intended land use and as set forth in this section.

(6) Public Agency Permits: The consideration for this type permit shall be the state-wide public benefit, use, health or safety: provided, that it shall be incumbent upon the applicant to show such state-wide applicability; otherwise a Public Agency Lease with monetary consideration shall apply.

(7) Right of Way: Eight percent (8%) per annum of the appraised land value, together with damages if any; or alternatively, for pipelines and conduits, 1½ cents per diameter inch per lineal foot per annum, or, in lieu of either of the foregoing, an annual rental, with a specified minimum, based upon the volume of commodities passing over State land. The minimum rental under any of the above alternatives shall not be less than $100 per annum.

(8) Protective Structure Permits: 8% of the appraised land value, however, with consideration for state-wide public benefits.

(9) Noncommercial Leases and Minor Commercial Leases: 8% of the appraised land value, with a $225 minimum annual rental.

(c) Rentals Subject to Law: In cases where leases are exempted from rental by law or if rates are particularly controlled or established by law, rental charges shall be governed by such law.

(d) Other Consideration: The Commission reserves the right to grant leases for such other considerations as may be deemed by the Commission to be in the best interests of the State.

(e) Review: Leases may contain provisions which provide for review of rental rates, at intervals as the Commission may require. Such leases shall provide that any new rental rate shall be effective upon reasonable notice to the lessee as more specifically set forth in the lease.

(f) Time of Payment: The first year's rental shall be paid in advance; rentals for following years shall be paid not later than 15 days after the beginning of each such following year, provided, however, that rental under leases requiring computations to ascertain the rental rate may be paid in whole or in part at other times as specified in the lease. Where the annual rental for any period is $225 or less, the total rental for such period or for 5 years, whichever is less, shall be paid in advance.

(g) Interest on Retroactive Payments: In the event that, for purposes of lease renewal or extension, a lessee does not agree to an annual rental, as offered by the Commission at the expiration of the lease period, and the lessee remains in possession of the leased lands while continuing to pay interim rental until a firm rental is agreed upon by the parties, than at such time as lessee submits payment for any or all retroactive rentals, the lessee shall pay interest to the State on said retroactive payments at the legal rate in effect at the time of said retroactive payment.

(h) Selection Among Alternative Rentals for Industrial and Right of Way Leases: The following factors shall be considered by the Commission in determining which of the alternative rentals provided for industrial and right of way leases is in the best interests of the State;

(1) Whether the land to be leased has been classified as environmentally significant under Article 11 of this Division;

(2) The actual and potential environmental damage inhering in the lessee's proposed use of the land, and the extent to which such damage is quantifiable;

(3) The revenue that would accrue to the State under each alternative;

(4) Whether a particular rental rate would have the result, if imposed by the Commission, of compelling the use of substitute facilities by the prospective lessee.

(5) The availability, reliability, and applicability of comparable or related data concerning the value of the land to be leased;

(6) Such other factors as, in the opinion of the Commission, reasonably bear on the appropriateness of the rental to be charged.

2007. Percentage Rentals and Limitations on Rentals Based on Volume of Commodities. (a) Commercial leases may provide for the payment to the State by the lessee of a minimum flat rent based upon land value, and/or a reasonable percentage of gross receipts where the Commission finds it is in the best interests of the State.

(b) If the Commission determines that a rental based on the volume of commodities passing over State land is in the best interests of the State, the following limitations to such volume rentals shall apply:

(1) Rental shall not be imposed for passage of a commodity over State land if rental has already accrued on that identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued.

(2) The rental rates for rights of way shall be apportioned in the proportion that the length of the pipeline or other structure over State land bears to the total length of the subject pipeline or structure over the land of the State and other persons. "Subject pipeline or structure" is defined as the pipeline or structure by which the commodity is being transported on a route between two facilities, uninterrupted by another facility. "Facility" includes terminal, production facility, storage facility, refinery or other manufacturing or processing facility, or point at which the commodity is or may be intermixed with the same or a different commodity.

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No. 84-16

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY, and
JESSE R. HUFF, members of the
CALIFORNIA STATE LANDS COMMISSION,
Appellants,
vs.
WESTERN OIL AND GAS ASSOCIATION, et al.,
Appellees.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MOTION TO AFFIRM

PHILIP K. VERLEGER
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK, VERLEGER
& SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

*Counsel for Appellees
Western Oil and Gas
Association, et al.*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

15pp

Appellees Western Oil and Gas Association, et al., respectfully move to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in this case on the grounds that (1) the decision of the Court of Appeals is plainly correct and (2) the questions presented by the appeal are insubstantial and do not warrant further argument. Sup. Ct. R. 16.

The Jurisdictional Statement of appellants sets forth the Court's jurisdiction and the Constitutional clauses and regulations involved in this appeal. These matters will not be repeated herein.

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TABLE OF AUTHORITIES CITED

Cases

No. 84-16

In the Supreme Court

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OCTOBER TERM, 1984

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Appellants,
vs.
WESTERN OIL AND GAS ASSOCIATION, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly determine that State regulations, which provide for a throughput charge based on the volume of commodities crossing State-owned tidelands and submerged lands, which throughput charge is in addition to a fair rental based on appraised value ("throughput regulations"), constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause of the Constitution?

2. Did the Court of Appeals correctly determine that the throughput regulations constitute an impost or duty on imports of commodities passing over State lands in violation of the Import-Export Clause of the Constitution?

STATEMENT OF THE CASE

This case arises from the fact that in 1953, with the adoption of the Submerged Lands Act, Congress granted to each coastal state, including California, a band which extends the length of the State from the mean high tide line out three miles to sea. As a result, it is essentially impossible for commodities transported by sea to enter the State without crossing State-owned real estate.[1] Almost all oil entering the State by sea must use pipelines crossing State property.[2] That, in turn, requires a lease from the State.

Prior to 1976, the California State Lands Commission ("Commission") leased that property at a "fair market rental" value determined on the basis of an appraisal. From 1976 to the present date, the Commission has continued to appraise the land and to fix a fair market rental based on the appraisal. In 1976, however, it adopted regulations calling for the collection, in addition, of a "throughput" rental, *i.e.*, a rental based on the amount of petroleum transmitted through pipelines over land the State owns. The total rental resulting is greatly in excess of the fair rental fixed by the State's own appraiser.[3]

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[1]While the State has granted limited narrow strips within the tidelands to its political instrumentalities, the cities and counties, the State still holds 99 percent of the California coastline and all of the shelf out to the three-mile limit. Thus, there is no way for commerce entering the State by sea to avoid State property or the property of State instrumentalities.

[2]Court of Appeals Opinion, Jurisdictional Statement p. A-5.

[3]District Court Opinion, Jurisdictional Statement p. A-19.

These regulations were challenged by a declaratory relief action filed in the United States District Court in 1976. The District Court held the throughput regulations invalid under the Commerce Clause, the Import-Export Clause, and the Duty of Tonnage provision of the Constitution in April 1982. The Court of Appeals affirmed the holding as to the Commerce Clause and the Import-Export Clause in January 1984. Copies of both opinions are annexed to the Jurisdictional Statement.

ARGUMENT

A. Summary of Argument

Although a state has general taxing power, it may not collect a tariff on imports and exports. Such a tariff is expressly forbidden by the Constitution. Similarly, such a charge would constitute an unconstitutional burden on interstate commerce and an unconstitutional duty on imports.

It is conceded that such charges are invalid under the State's general taxing power. The State, nevertheless, seeks to defend the charges in the present case as being based on the State's proprietary powers. But, since the State owns essentially all of the real estate along its borders out to the three-mile limit, these constitutional prohibitions would be meaningless if the State could use its "proprietary" powers to accomplish precisely the result which is forbidden to its taxing power under the Constitution. That is all that the Court of Appeals held. This is a proposition of sufficiently obvious correctness that it should hardly be necessary for this Court to deal with it.

B. The Basic Flaw in the State's Argument: It Simply Ignores the Problem

The basic flaw in the argument presented in the State's motion is a simple one. The State simply ignores the problem. We have pointed out throughout that, since the State has all the land out to the three-mile limit, it is in a position to exact the precise equivalent of a tariff by making a throughput charge for the use of that land, and we have urged that this is exactly what the State did. If the State's argument had validity, the charge in the present case would have been unconstitutional as applied to foreign commerce if it was called a "tariff," but would somehow miraculously become constitutional because it was called a rent. That, of course, is palpable nonsense. As the Court of Appeals noted, it is the practical effect and not the label that deter-

mines whether legislation or regulation passes Constitutional muster. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

In this connection, the "user" fee cases on which the Court of Appeals relied are of direct pertinence.[4] A user fee is permissible for an essential State facility in commerce to the extent that it reflects benefits conferred by the State or costs incurred by the State but becomes an unconstitutional burden on interstate commerce if its goes beyond that level. The problem addressed by the court in the user fee cases is that of distinguishing between a burdensome effort to use a strategic position to enlarge revenue at the expense of commerce as opposed to a reasonable charge for services or benefits. The analysis of those cases is, therefore, highly appropriate to a situation like the present, where the state owns the tidelands and all the subsea land out for three miles, surely an essential throat of commerce. Indeed, the State's criticism of the Court of Appeals' reliance on these decisions is flawed in the same way that the State's analysis is: it simply ignores the basic question, which is whether they can collect a charge in all respects the same as a tariff by calling it a rental.

C. The Import-Export Clause Prohibits the Imposition of a Throughput Charge

The Court of Appeals correctly held that the throughput regulations impose a tax forbidden by the Import-Export Clause of the Constitution. The Import-Export Clause, Article I, Section 10, Clause 2, of the Constitution, provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Ex-

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[4]See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981); *Complete Auto Transit, Inc. v. Brady*, *supra*, 430 U.S. 274 (1977); *Nippert v. Richmond*, 327 U.S. 416 (1946); *St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).

> ports, except what may be absolutely necessary to executing its Inspection Laws . . ."

The Import-Export Clause has a three-part test. First, the charge may not usurp the federal government's authority to regulate foreign relations by creating a special protective tariff which discriminates against imports. Second, the charge may not deprive the federal government of the right to all revenues from imposts and duties unless it is reasonably related to the value of services rendered by the State. Third, the charge must be reasonably related to services provided so as not to disturb harmony among the states. The test here is similar to the Commerce Clause inquiry. Simply, the Constitution allows the State to seek compensation for services and property it provides. Seaboard states are forbidden, however, from exploiting their position to the detriment of foreign commerce. These considerations are articulated in numerous Supreme Court cases, such as *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), and *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976).

The Court of Appeals correctly focused on whether there is a correlation between the throughput charge and benefits conferred by the State. It found:

> "California is exploiting its favorable geographic situation to exact a transit fee from the goods in question. It is 'levying . . . on citizens of other States by taxing goods merely flowing through their ports to the other states not situated as favorably geographically.'"
>
> Court of Appeals' Opinion, Jurisdictional Statement pp. A-12, 13.

That holding is clearly the correct one.

D. The Throughput Regulations Are Invalid Under Familiar Commerce Clause Principles

The Court of Appeals also correctly held that the throughput regulations violate the Commerce Clause. The Commerce Clause states:

> "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

The application of the Commerce Clause today may be distilled into just a few words: Is the charge reasonably calculated to reimburse a state for the cost of providing services and benefits? If so, it is not an unconstitutional burden on interstate commerce. Put another way: Is the charge designed to generate a fee in excess of what will fairly compensate a state for services rendered or benefits provided? If so, the charge constitutes a burden on interstate commerce and is invalid. *Washington Dept. of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

We have seen that, where State property is a necessary facility for interstate commerce, as here, the "user" fee or rent must have a reasonable relationship to benefits conferred by the State. This is a necessary restriction evolved to deal with ownership by the State of basic interstate facilities, such as airports. It applies, a *fortiori,* in a case like the present, where the State owns the entire sweep of tidelands from Oregon to the Mexican border, a distance of well over a thousand miles. In the present case, the Court of Appeals correctly concluded that the throughput charge is not directed toward compensating the State for the use of the land and that there is no correlation between benefits conferred by the State and the charges. The land leased by the Commission is admittedly unimproved. No services

or facilities are provided by the State.[5] Appellees must perform all operations required to make the land usable, from dredging to construction. All that the State gives is the right to traverse its land with this interstate commerce and the right to build the facilities on its land necessary for such commerce.

It is surely of great significance in this connection that, admittedly, the State first collects a reasonable rental based on its appraisal, which the pipeline owner is bound to pay in any event. Then, the State tacks on its throughput charge, which bears no relationship at all to the rental value of the land provided by the State. Rather, it reflects the State's grip, through its real property ownership, on the throat of interstate commerce.

The Court of Appeals correctly observed:

> "We are of the opinion that the volumetric rates are a disguised revenue raising measure. The rates do not reflect the value to the State of its land, but the maximum amount of revenue California can extract from interstate commerce by utilizing its strategic geographic position. There is no correlation between benefits conferred by the State and the throughput charges.

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[5]In this connection, both the District Court and the Court of Appeals found that the Commission leased unimproved land and provided no benefits or services in connection therewith. Both courts rejected as irrelevant the Commission's claim that its leasing practices were or should be the same as those employed by private parties or ports. The State's Jurisdictional Statement ignores these findings and continues to argue that its throughput regulations are comparable and somehow, therefor, reasonable. But, it is well estabished that the Supreme Court accepts as conclusive the findings in which the two courts below concur unless clear error is shown. *Continental Ill. Natl. Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co,.* 294 U.S. 648, 678 (1935); *Dun v. Lumbermen's Credit Assn.*, 209 U.S. 20, 23-4 (1908). No such error is shown, or even argued, by the State. The State's attempt to "back-door" the previously rejected facts contained in the record, therefore, should be rejected.

We therefore hold that the charges impose an undue burden on interstate commerce and are violative of the Commerce Clause."

Court of Appeals' opinion, Jurisdictional Statement p. A-10.

Given that there is no such correlation between benefits conferred and the throughput regulations, this Court must assume, which is the fact, that the Court of Appeals' opinion does no violence at all to the consistent body of authority in this area.

E. The Ninth Circuit's Holding Applies Only to the Commission's Throughput Regulations.

The Court of Appeals was careful to explain that its holding did not invalidate all throughput types of leases. (Jurisdictional Statement, p. A-13.) It correctly found that the throughput rental was unconstitutional under the Commerce Clause and the Import-Export Clause but that other volumetric charges would be judged on the basis of their result, not their formula (*Id.*)

Thus, the holding of the Court below will not affect charges by public ports, as the State now claims. It will serve to tell the State, however, that it cannot impose a prohibited tariff by calling it a rental.

CONCLUSION

All that this case holds is that a state may not collect a tariff by calling it a rental. That is hardly a proposition which requires the attention of this Court. For all of the reasons stated herein, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

August , 1984

Respectfully submitted,

PHILIP K. VERLEGER
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400
Counsel for Appellees Western Oil and Gas Association, et al.

No. 84-16

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

KENNETH CORY, et al.,
members of the California
State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court
of Appealsfor the Ninth Circuit

BRIEF OPPOSING MOTION TO AFFIRM

JOHN K. VAN DE KAMP, Attorney
General of the State of
California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-3650

Counsel for Appellants

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TABLE OF AUTHORITIES

No. 84-16

IN THE SUPREME COURT OF THE UNITED STATES

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Appellees.

On Appeal from the United States Court
of Appeals for the Ninth Circuit

BRIEF OPPOSING MOTION TO AFFIRM

In this case, the Ninth Circuit held that the State of California is prohibited by the Commerce and Import-Export Clauses from using a volumetric form of rent, regardless of amount, when leasing unimproved state land to lessees engaged in interstate or foreign commerce. The State argues, *inter alia*, that the

volumetric rental form is commonly used for ground leases of unimproved land, including leases by local ports to these very appellees, and that there is no constitutional principle that renders such a form of rent, per se and regardless of amount, constitutionally infirm.

In their motion to affirm, appellees characterize this form of ground lease rental as nothing more than a "tariff" under a different name, and therefore conclude that it violates the Import-Export Clause. They also characterize volumetric rent as an additional charge "tacked on" over and above a "fair" and "reasonable" rental, and therefore per se unreasonable under the Commerce Clause. Both arguments are dependent upon mischaracterizations of fact that are here refuted in summary fashion, as follows:

1. Because a tariff operates upon all units of an imported commodity, the

appellee companies falsely suggest that an equivalent situation exists here, misrepresenting (a) that the State has a monopoly of the land over which their commodity must pass (Motion, pp. 2, 4, 5, 7, 8), and (b) that mere transient passage "by sea" over such monopolized lands generates a volumetric charge (Motion, pp. 1-2). The facts are otherwise.

First, the State has no monopoly over tide and submerged lands; appellees' "throat of commerce" is a patchwork of ownerships. (See Jurisdictional Statement, pp. 8-9, fn. 6.) Just looking at the ownership of tide and submerged lands held by local cities, counties, and districts under legislative grants, and ignoring private grants of such lands, there are 418 miles of tidal shoreline and 305,381 acres (over 477 square miles) that are controlled by

local entities. (Cal. State Lands Com., Granted Lands Summary (1977).) The City of Los Angeles alone controls 26 miles of shoreline under such a grant, comprising 13,430 acres. (Ibid.) We are at a loss to know where appellees got their "99 percent" figure for state ownership (Motion, p. 2, fn. 1), and they give no supporting citation.

Second, and more importantly, it is not mere transient passage of commodities through state waters that may generate a volumetric charge, but only passage over a limited number of discrete parcels of state real property which are to be devoted, by lease, to exclusive private use, in this case including construction of improvements, such as wharves. Commodities passing over the lands of the local ports, for instance, do not generate any volumetric revenue to the State. The challenged regulations are leasing

regulations and it is clear from the face of them that the various forms of rent authorized therein do not apply in any transcendent, across-the-board fashion, independent of a document creating a leasehold and a consequent obligation to pay rent. Accordingly, the regulations do not authorize a tariff or anything like a tariff.

2. Volumetric rent is not "tacked on" over and above a fixed rental figure that already reflects the State's appraisal of a "fair" or "reasonable" rent. (See Motion, pp. 2, 8.) As with percentage leases, there is a fixed minimum rental figure which is applied against the accrued variable rent, and which is to be paid in any event, even if the rent accrued under the variable rent provision does not reach the minimum. In other words, there will be instances, even though commodities pass

over the leased land, where no rent will be paid above the minimum, because the volume of commodities was insufficient to generate a rent in excess of the minimum rent. In such cases, the flat minimum rent will be paid, and no more. The record is without dispute on this point. (Clerk's docket item 26, Horn Affidavit, pp. 5-6; Clerk's docket item 24 (leases attached to various declarations of appellees).) This interrelationship of a minimum rent figure with the variable rent provision of a lease conforms with standard practice under variable rent leases. (See Grenert, Ground Lease Practice (Cal.Cont.Ed.Bar 1971), §§ 1.40, 1.41, 2.12-2.14.)

Further, the amount of this minimum rent is itself subject to negotiation between the parties, and is not unilaterally set by any "state appraiser". (Horn Affidavit, _supra_, pp. 5, 7-8.)

CONCLUSION

Appellees' motion to affirm should be denied. Appellants respectfully request that the Court either summarily reverse, or set the case for plenary consideration.

DATED: August 13, 1984

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney
General of the State of
California
N. GREGORY TAYLOR
Assistant Attorney General

DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-3650

Counsel for Appellants

Affidavit of Service by Mail

Cory, et al. v. Western Oil & Gas Assn., et al.
U.S. Supreme Court
No. 84-16

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

Melinda M. Gee, being first duly sworn, on oath deposes and states:

I am over 18 years of age, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102. I served a true copy of the attached

BRIEF OPPOSING MOTION TO AFFIRM

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Philip Marskey, Esq.
[3] Ingoglia, Marskey & Kearney
918 - 2nd Street
Sacramento, CA 95814

Betty-Jane Kirwan, Esq.
[3] McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, CA 90017

Each said envelope was then, on August 13, 1984, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

All parties required to be served have been served.

Melinda M. Gee
AFFIANT

Subscribed and sworn to before me this 13th day of August, 19 84.

Cynthia S. Woo
Notary Public in and for said County and State

OFFICIAL SEAL
CYNTHIA S. WOO
NOTARY PUBLIC CALIFORNIA
SAN FRANCISCO COUNTY
My commission expires Dec 28, 1984

No. 84-16

In the Supreme Court
OF THE
United States

October Term, 1984

Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff, members of the California State Lands Commission,
Appellants,

vs.

Western Oil and Gas Association, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

LISTS OF APPELLEES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES (RULE 28.1)

Philip K. Verleger
Counsel of Record
Betty-Jane Kirwan
John P. Zaimes
McCutchen, Black, Verleger & Shea
600 Wilshire Boulevard
Los Angeles, CA 90017
(213) 624-2400

Counsel for Appellees Western Oil and Gas Association, et al.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

48pp

No. 84-16

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October Term, 1984

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vs.

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Appellees.

LISTS OF APPELLEES' PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES (RULE 28.1)

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, the appellees herein, Atlantic Richfield Company, Edgington Oil Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Pacific Refining Company, Shell Oil Company, Standard Oil Company of California, Union Oil Company of California, and the Western Oil and Gas Association, hereby respectfully submit their lists of parents, subsidiaries and affiliates.

ATLANTIC RICHFIELD COMPANY

Subsidiaries and Affiliates:

ABE Beverage, Inc.

Agro Internacional, S. de R. L. de C.V.

Air Management Mechanical and Solar
Airtron Inc.
Allweather, Inc.
Almeg Extrusion Company, Inc.
Alpart Farms (Jamaica), Ltd.
Alumina Contractors Ltd.
Alumina Partners of Jamaica
Alyeska Pipeline Service Company
The Ambler Mining Company (a partnership)
AMC Securities Inc.
AMCOR-Chem. Inc.
Anaconda Advanced Technology, Inc.
Anaconda Aluminum Company
Anaconda Aluminum Services Company
Anaconda Arizona, Inc.
Anaconda Australia Inc.
Anaconda Bauxite S.A.
Anaconda Canada Exploration Ltd.
Anaconda Chile S.A.
The Anaconda Company (North Dakota)
The Anaconda Company (Delaware)
Anaconda Exploration New Zealand Limited
Anaconda Holdings do Brasil LTDA.
Anaconda Indonesia Inc.
Anaconda International Corporation
Anaconda-Iran, Inc.
Anaconda Ireland Company
Anaconda Jamaica Inc.
Anaconda Minerals Corporation
Anaconda Mining Company
Anaconda Moly Company
Anaconda Overseas Services Inc.
Anaconda Peru, Inc.
Anaconda Properties Company
Anaconda Sales Company

Anaconda Shannon Company
Anaconda South America, Inc.
Anaconda Valve Company
Anaflex, S.A. de C.V.
Anamax Mining Company (a partnership)
Anamet, S.A. de C.V.
Andes del Peru
ARCHEM Company
ARCO Alaska, Inc.
ARCO Argentina Inc.
ARCO Asia Inc.
ARCO Australia Coal Pty. Ltd.
ARCO Australia Limited
ARCO Bahamas Inc.
ARCO Bangladesh, Inc.
ARCO Belize Limited
ARCO Brazil Inc.
ARCO British Limited
ARCO Centennial Corp.
ARCO Channelview, Inc.
ARCO Chemical Asia Pacific, Ltd.
ARCO Chemical Corporation
ARCO Chemical Europe, Inc.
ARCO Chemical (Europe) Inc.
ARCO Chemical Export Sales Company
ARCO Chemical IBERICA, S.A.
ARCO Chemical International Company
ARCO Chemical Products Europe, Inc.
ARCO Chemical Trading, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chile LNG Inc.
ARCO China Inc.
ARCO Coal Sales Company
ARCO Colombia Oil Corporation
ARCO Comfort Products Co.

ARCO Communications Inc.
ARCO Credit Corporation
ARCO Crude Trading Inc.
ARCO Denmark Inc.
ARCO Dubai Inc.
ARCO Durethene Pipe, Inc.
ARCO Durethene Plastics, Inc.
ARCO East Africa Inc.
ARCO Ecuador Corporation (inactive)
ARCO Egypt, Inc.
ARCO El Salvador, Inc.
ARCO Energy Conservation, Inc.
ARCO Energy Transportation, Inc.
ARCO Environmental Inc.
ARCO Exploration Corporation
ARCO Exploration, Inc.
ARCO Export Inc.
ARCO Far East Exploration Inc.
ARCO Ft. Madison, Inc.
ARCOGraph, Inc.
ARCO Graphite Inc.
ARCO Greenland A/S
ARCO Greenland Inc.
ARCO Guatemala Inc.
ARCO Ilocos Inc.
ARCO International Oil and Gas Corporation
ARCO International Petroleum, Inc.
ARCO International Services, Inc.
ARCO International Transportation, Inc.
ARCO Iran Inc.
ARCO Ireland Inc.
ARCO Italy Inc.
ARCO Kenya Inc.
ARCO Kuparuk Shipping Company
ARCO Latin America Inc.

ARCO Lyondell, Inc.
ARCO Malaysia Inc.
ARCO Marine, Inc.
ARCO Mauritania Inc.
ARCO Medical Products Company
ARCO Metals Company
ARCO Metals Overseas Services Inc.
ARCO Metals Trucking Company
ARCO Mindoro Inc.
ARCO Montana Inc.
ARCO Morocco Inc.
ARCO Netherlands Inc.
ARCO New Mexico, Inc.
ARCO Nicaragua Corporation
ARCO Norge A/S
ARCO Norway Mineraler A/S
ARCO Norway Inc.
ARCO Norway Systems Inc.
ARCO Nuclear Company
ARCO Offshore Inc.
ARCO Oil and Gas Corporation
ARCO Oil Company Nigeria
ARCO Oil Limited
ARCO Oil Producing, Inc.
ARCO Oil Refining Company
ARCO Oman Inc.
ARCO Pakistan Inc.
ARCO Panama Transportation, Inc.
ARCO Performance Chemicals (PTE) Ltd.
ARCO Peru Corporation
ARCO Petroleum Company (name holder)
ARCO Philippines Inc.
ARCO Pipe Line Company
ARCO Property Management Inc.
ARCO Publications Inc.

ARCO Satcom, Inc.
ARCO Sebree, Inc.
ARCO Seed Company
ARCO Seed Company International
ARCO Solar, Inc.
ARCO Solar African Sales, Inc.
ARCO Solar Electric Power, Inc.
ARCO Solar Europe, Inc.
ARCO Solar Europe S.p.A.
ARCO Solar Far East PTE. Ltd.
ARCO Solar Group, Inc.
ARCO Solar Industries
ARCO Solar International, Inc.
ARCO Solar Ltda.
ARCO Solar Middle East, Inc.
ARCO Solar Nigeria Ltd.
ARCO Solar Power Production, Inc.
ARCO Solar Technical Services, Inc.
ARCO Somalia Incorporated
ARCO Spain Inc.
ARCO Sudan Inc.
ARCO Tankers, Inc.
ARCO Technology, Inc.
ARCO Thailand Inc.
ARCO Transportation Corporation
ARCO Turkey Inc.
ARCO Venezuela Inc.
ARCO West Africa Inc.
Arcoal, Inc.
Arcoal Transportation, Inc.
Arcobrasil Participacoes e Investimentos Ltda.
ARCOtravel Club, Inc.
ARDEV Company, Inc.
Arilan, S.A. de C.V.
Arlan Corporation

Arpet Petroleum Limited
Arphos, Inc.
A/S Skaland Grafitiverk
Atlantic Refining Company
Atlantic Refining Company of Cuba (inactive)
Atlantic Richfield Argentina Inc.
Atlantic Richfield Bali North Inc.
Atlantic Richfield de Mexico, S.A. de C.V.
Atlantic Richfield Foundation of California
Atlantic Richfield France, Inc.
Atlantic Richfield Hanford Company (inactive)
Atlantic Richfield Indiana, Inc.
Atlantic Richfield Indonesia Coal, Inc.
Atlantic Richfield Indonesia Inc.
Atlantic Richfield International Finance Corporation
Atlantic Richfield Investment Company
Atlantic Richfield Kentucky Corporation
Atlantic Richfield Medical Products (Ireland) Limited
Atlantic Richfield Oil Limited
Atlantic Richfield Overseas Finance N.V.
Atreco, Inc.
Atreco Investment Company
Aughinish Alumina, Ltd.
Aughinish Estates Limited
Aughinish Finance, Limited
Aughinish Property (Nominees) Limited
Badger Pipeline Company
Beaver Creek Coal Company
Benson-Goss Fuels, Inc.
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Bogen, Inc.
Bolivian Atlantic Corporation
Bolivian Petroleum Corporation

Border Pipe Line Company
Brandywine Oil Company
The British American Metals Company, Limited
Buckley & Scott Co.
Buckley & Scott, Whetton, Inc.
Butte, Anaconda & Pacific Railway Company
Butte Water Company
Candel International Limited
Candelaria Exploration Corporation
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines Ltd.
Casitas Pipeline Company
Casolin, S.A.
Centroamericana de Cobre, S.A.
ChemLink, Inc.
ChemLink Petroleum Inc.
Cheviot Hills Pipeline Company
Chile Copper Company
Cimarron Properties, Inc.
City Wide Air Conditioning Co., Inc.
Cobre de Hercules, S.A.
Cobre de Mexico, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania Atlantic de Petroleo
Compania de Petroleo Ganso Azul, Ltda.
Compania Mexicana de Petroleo "El Charro", S.A.
Compania Minera Dos Republicas S.A. de C.V.
Compania Minera Kappa S.A.
Compania Minera Penacobre, S.A.
Compania Petrolera Carco
Cook Inlet Pipe Line Company
Cranston Properties, Inc.
Cupro San Luis, S.A. de C.V.
Curragh Coal Sales Co. Pty. Ltd.
Curragh Queensland Mining Limited

Cuyama Pipeline Company
Delaware Bay Transportation Company
Delta Housing Inc.
Dessert Seed Company, Inc. (nameholder)
Dexter de Mexico, S.A.
Dixie Pipeline Company
Dock's Creek River Terminal, Inc.
East Texas Salt Water Disposal Co.
Eastern-Narragansett Oil Company
85819 Canada Limited
Eisenhower Mining Company (a partnership)
Elector of Palatine, Inc.
Empresa Carioca de Productos Quimicos S.A.
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Energy Transportation Systems, Inc.
Ericsson Inc.
Fahnestock, Inc.
Flower Street Limited (a partnership)
Four Corners Pipe Line Company
Gardner Oil Company, Inc.
George Smith, Inc.
George Smith Inc. of San Antonio
George Y. Brubaker, Inc.
Gieske Sheet Metal Co.
Gill Bros., Inc.
Gravity Adjustment, Inc.
Greater Pacific Limited
Greene Cananea Copper Company
Griffith-Consumers Company
H. K. Wallace, Inc.
Hardy Oil Company
Hondo Coal Company
Hondo Oil & Gas Company
Housing Services, Inc.
Imperial Eastman de Mexico, S.A.

Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industrias Tecnos, S.A. de C.V.
Integrated Solar International Sales, Inc.
Iricon Agency Ltd.
J. R. Hobbs, Company
Jamaica Alumina Security Company Ltd.
Joaquin Ranch Company
Junction Projects, Inc.
Kenai Pipe Line Company
Kinney Air Conditioning Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Pipeline Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Lamborn Land Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Libyan American Oil Company
Libyan Atlantic Company
Lingobronce, S.A.
Los Palacios Exploration Corp. (inactive)
Major Petroleum Company
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Marlin Delaware Corporation
Mayflower Mining Company
Mesa Pipeline Company
Mineracao Anaconda Brasil Ltda.
Minera Anaconda Limitada (a partnership)
Montoro, Empresa Para La Industria Quimica
N. T. Development, Inc.
Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Newton Square Properties Inc.

Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
Northrup Incorporated
Observer International Inc.
Oxirane Chemical Company
Oxirane Technology (Japan) Company (Partnership)
P. T. Arutmin Indonesia
Pacific Marine Oil Company
Palomar Land Company
Pan American Petroleum Company of California
Park City Ventures (a partnership)
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Park-Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Philadelphia Tankers, Inc.
Platte Pipe Line Company
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Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Quiggin & Son, Inc.
R. W. Miller (Holdings) Limited
Reno Junction Development, Inc.
Resolution Seismic Services, Inc.
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Richfield U. K. Petroleum, Limited
Rio Grande Gasoline Company
Rodas Exploration Corporation
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Russell Coal & Oil Company
S A Investment Company, Inc.
Santa Cruz Exploration Corporation
Sartomer Company
The Saudi Cable Company

Schultz, Doyle & Stoddard, Inc.
Servicios Industriales Nacobre, S.A.
Sherman Equipment Corporation
Silva Exploration Corporation
Sinclair Deutschland Erdol Gessellschaft
Sinclair International Oil Company
Sinclair Netherlands Oil Company
Sinclair (U.K.) Oil Company Limited (SIOC)
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedade Anonima Marvin
Solar Energy Center (E.C.)
Solvamex, S.A. de C.V.
Stup & Costello, Inc.
Sumiarco Company Limited
Swecomex, S.A.
Tabasco Gas Pipe Line Company
Tanker Transport, Inc.
Tankers Leasing Corporation
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Thunder Basin Coal Company
Tooele Valley Railway Company
Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
United Park City Mines Company
Valley Dehydrating Co., Inc.
Venezuelan Atlantic Refining Company
Venezuelan Atlantic Transmission Corp.
The Walworth Company
West Elk Coal Company, Inc.
West Mayflower Mining Company
William C. Pullen, Inc.
William Prym de Mexico S.A.

Wisconsin Centrifugal, Incorporated
Wright Oil Co., Inc.

EDGINGTON OIL COMPANY, INC.
Parents:

Newedge
Triad Energy Corporation
Triad America Corporation

Subsidiaries and Affiliates of Edgington:
Hercules Oil Co. of San Diego, Inc.
Sahuaro Petroleum & Asphalt Co.
Edgington International Ltd.
Edgington Oil International, Inc.
Edgington Management Services, Inc.
Oasis Aviation Inc.
Agrifuels Refining Corporation

EXXON CORPORATION
Subsidiaries and Affiliates:

Abu Dhabi Petroleum Company Limited
Abu Dhabi Company for Onshore Oil Operations
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit besohrankter Haftung
Aishin Sekiyu K. K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company

Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthaven, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Assistance Services S.A.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
BSB Gewerkschaften Brigitta und Elwerath
Betriebafuhrunggesellschaft m.b.H.
Bel-Air Entreposage S.A.
BTAS, Inc.
Building Products of Canada Limited
Byron Creek Collieries Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Cia Refinadora Petrola Santo Domingo, Inc.
Colmant Cuvelier Dodge S.A.
Colmar Suriname Oil Company, Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S.A.
Compania Minera Disputada de Las Condeo S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.

Daiichi Kouyu K. K.
Daitsu Sangyo K.K.
Delta Hope & Twine Limited
Depot Petrolier du Grosivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelecentralen Aktiebolag
Dukhan Service Company
86129 Canada Ltd.
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskebet ef 12. juni 1964
Eiwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C.A.
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited

Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
European Gas & Electric Company
Exact Reisebyra A/S
Excess and Treaty Reinsurance Corporation
446259 Ontario Limited
FPE South Africa (Propietary) Limited
F. T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjan de Colombia, S.A.
Fuji Kogyo K.K.
Fuji Uuyu K. K.
Fukui Sekiyu K.K.
General Busaan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane — Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwe. ath
Gewerkschaft Elwerath & Co. GmbH
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarro do Brasil S. A. — Equipamentos
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.

Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K.K.
Houston Regional Monitoring Corporation
Hydranten-Betriebagesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Iudustrias Reliance S.A. de C.V.
Intecom, Inc.
Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B.V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Investment Promotion Enterprises Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai

K.K. Kyoei Shosho
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Niimi Kirun
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsseiskebet af 8, oktober 1965
K/S Hoje Taastrup Storcenter 11
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kyguna Sekiyu Hambai Kabushiki Kaisha
Kawasaki Naiko Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kiinteisto Oy Myllynkallio
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LFL Investments, Inc.
La Compagnie Electrique Pioneer du Quebec, Inc.

Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzerisches Erdol
Les Dooks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu .K.
Magyar Amerikai Olajipari Reszvenytarsaaag
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maortgaz Ertekesito R. T.
Maple Leaf Petroleum Limited
Maquinas de Coser y Border Sigma, S. A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Mongeau & Robert Cie Ltee
Montreal Pipe Line Limited/Les Pipe Lines Montreal Limitee
Moraine Properties Ltd.
95269 Canada Limited
Nakabayashi Sekiyu K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.

Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit
beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P. T. Stonvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petrole Assistance Lyon (S.A.R.L.)
Petrole Assistance Marseille (S.A.)
Petrole Assistance Orleans (S.A.R.L.)
Petrole Assistance Paris T.R. (SA)
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company, Inc.
Petrosvibri S.A.
Pipeline Service
Pipe Line Service Company, Inc.
Pipeline Service Iran

Pipeline Service U.K.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Polyolefins Product Co. Pty. Ltd.
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Qatar Petroleum Company Limited
Qualbank, Inc.
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Reliance Electric & Engineering Company de Mexico
S.A. de C.V.
Reliance Electric Limited
Reliance Electric Ltd.
Reliance Electric S.A. (Spain)
Renix Co. Ltd.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire
Genevoia (SAPPRO)
S & M Pipeline Limited
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.

Schubert KG
SEAG Aktiengesellschaft fur schweizerisches Erdol
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K. K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa per Azioni Raffineria Padana Olii Minerali—
SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de
Madagascar"—PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des
Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariesse
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliers "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation

Societe de Manutention de Carburants Aviation
Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique
(CARTHACO)
Societe d'Entrepoisage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Development d'Operations
Commerciales
Societe du Ceoutohouc Butyl (SOCABU)
Societe du Depot Petrolier d'Hauconcourt
Societe du Parkings du Square Boucicaut
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe Esso de Recherches et d'Exploitation Petrolieres
Esso Rep
Societe "Geomines-Caon"
Societe Harvaise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Compagne
Societe Immobiliere Paris-Niel
Societe Industrielle de Mecanique et d'Equipement
Petrolier S.I.M.E.P. (S.A.R.L.)
Societe Italiana per l'Oleodotto Transalpino S.p.A.
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe du Pipeline Sud-Europeen
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company
(Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologque de Gaz de Lavora

Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Suntech Company, Ltd.
Supertex, Inc.
Svensk Petroleumlagring Tre Aktiebolag
Syncrude Canada Ltd.
Synergistics Chemicals Limited
305120 Alberta Ltd.
346877 Ontario Limited
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellchaft Nurnberg mbH
Taihel Bussan K.K.
Taiko Skiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegersohen AG
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tos Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Seikyuksgaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha

Tonen Technology K.K.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich
Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera
Taurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG — Unterflurbetankungsanlage Flughafen Zurich
Ulupna Estates Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W. H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kaesi Kabushiki Kaisha
Westdeutche Erdolleitungs — G.m.b.H.
Westgas G.m.b.H.
Williamsport Properties Limited
Winnepeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex Distribution
Wrenford Insurance Company Ltd.
Yasaka Sekiyu, K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yusi Sekiyu K.K.
Yugan Kaisha Nishi Kobe Dosai Center

GETTY OIL COMPANY

Subsidiaries and Affiliates:

Apple Valley Ranchos Water Co.
Arbuckle Pipe Line Company
Associated Oil Company
Basin Drilling Corp.

Canadian Reserve Oil and Gas Ltd.
  Getty Synthetic Fuels (Canada), Ltd.
Chembond Corporation
  Chembond of British Columbia Ltd.
Colombian Reserve Oil and Gas Company
FORM Foreign Reinsurance Management AG
Frontier Hotels, Inc.
Getty Asian Oil Company
Getty Canadian Minerals, Limited
  Getty Canadian Metals, Limited
Getty Capital Corporation
Getty Chemical Company
  Chemplex Company (Joint Venture)
    Chemplex Company
  Chemplex Construction Corporation
Getty Crude Gathering, Inc.
Getty Energy Company
Getty Gas Gathering, Inc.
Getty International, Inc.
Getty Iran Ltd.
  Iricon Agency Ltd.
Getty Marine (Bahamas) Limited
Getty Marine Corporation
  Getty Maritime, Inc.
    Getty Marine Services Limited
Getty Mining Company
  Colorado Yampa Coal Company
  Getty Coal Company
    Colorado Yampa Leasing Company
    Getty Coal Leasing Company
  Getty Minerals Company
    Plateau Company
  Getty Minerals Marketing, Inc.

Getty Mining International, Inc.
Getty Minerals Company, Limited
Getty Mines, Limited
Getty Mining (Chile), Inc.
Getty Mining (Ireland) Ltd.
Getty Mining Northwest, Limited
Getty Mining (Philippines), Inc.
Getty Mining (Portugal), Inc.
Getty Mining Pty. Ltd.
Getty Oil Development Company
Huelva Pyrites, Inc.
Seville Metals Corporation
Grande Properties, Inc.
Petrotomics Company
Plateau Mining Company
Twentymile Coal Company
Getty Oil (Angola), Limited
Getty Oil (Bahamas), Inc.
Getty Oil (Britain) Limited
Getty Oil Exploration (U.K.), Limited
Getty Oil (Cilacap), Inc.
Getty Oil (Congo), Inc.
Getty Oil (Denmark), Inc.
Getty Oil (Germany), Inc.
Getty Oil (Guatemala), Inc.
Getty Oil (Ivory Coast), Inc.
Getty Oil (Mauritania), Inc.
Getty Oil (Merangin), Inc.
Getty Oil (Morocco), Inc.
Getty Oil (Mossel Bay), Ltd.
Getty Oil (Pelabuhan Ratu), Inc.
Getty Oil (Peru), Inc.
Getty Oil (Sharjah), Inc.
Getty Oil (Suez), Inc.
Getty Oil (Sumatra), Inc.

Getty Oil (Tomori), Inc.
Getty Oil (Germany), Inc.
Getty Oil (Walvis Bay), Ltd.
Getty Oil Company Foundation
Getty Oil Company of Spain S.A.
Getty Oil Drilling Company
Getty Oil Exploration Company
Getty Oil International
(Antilles) N.V.
Getty Oil International
(Barito Basin), Inc.
Getty Oil International
(Caribbean) N.V.
Getty Oil International
(East Gharib Egypt), Inc.
Getty Oil International
(Equatorial Guinea), Inc.
Getty Oil International (Ghana), Inc.
Getty Oil International
(Guatemala), Inc.
Getty Oil International (Indonesia), Inc.
Getty Oil International (Ireland), Ltd.
Getty Oil International (Orient), Inc.
Getty Oil International
(Somalia), Ltd.
Getty Oil International (Togo), Limited
Getty Oil International Exploration
Company
Getty Oil Operations Company
Getty Trading and Transportation
Company
Bay Transport Corporation
Butte Pipe Line Company
Getty Crude Terminals, Inc.
Getty NGL Trading, Inc.

Gibson Holdings, Ltd.
Gibson Petroleum Ltd.
North Slope Gas Transmission Corporation
North Slope Pipe Line Corporation
Northern Tier Pipeline Company
Pontotoc Oil Company
Texoma Pipe Line Company
Uinta Pipeline Corporation
Wascana Pipe Line, Inc.
Wascana Pipe Line, Ltd.
Wesco Gas Services, Inc.
Wesco International, Inc.
Western Crude Oil, Inc.
Getty Trading International, Inc.
Easco, S.A.
Easco Mineraloel GmbH.
Easco Marine, Ltd.
Getty Trading (Nederland) B.V.
Getty Trading (U.K.) Ltd.
Getty Trading (Italia) S.r.l.
Wesco Petroleum, Ltd.
Wesco Pipe Line Company
West Shore Corporation
Western Gravities, Inc.
Getty Petroleum Company
Mediterranean (Algeria) Oil Company
Getty Petroleum Ireland Limited
Getty Pipe Line Company
Getty Pipeline, Inc.
Chase Transportation Company
Chisholm Pipeline Company
MAGEC Finance Company
Osage Pipe Line Company

Seminole Pipeline Company
Texas-New Mexico Pipe Line
Company
Getty Refining and Marketing Company
Chase Terminal Company
Getty Eastern Pipeline Company
Getty Fleet Corporation
Getty Pipe Company
Mohawk Crude Purchasing
Company
Mohawk Petroleum Corporation,
Inc.
Petroman, Inc.
Skelgas, Inc.
Getty Rice Ranch Estates, Inc.
Getty Scientific Development Company
Getty Synthetic Fuels, Inc.
Halbouty Alaska Oil Company
Hawkeye Chemical Company
Iberian Petroleum, Ltd.
Minnehoma Corporation
Minnehoma Cotton, Inc.
Minnehoma Development, Inc.
Minnehoma Land and Farming Company
Norske Getty Exploration A/S
Nuclear Fuel Services, Inc.
Pacific Western Oil Corporation
Reserve Oil and Gas Company
Seville Metals Corporation
Skelly Leasing Company
Vanply, Inc.
Vancouver Plywood Co., Inc.
Vanply of Liberia, Inc.
Skelly Oil Company

Tide Water Oil Company (India), Limited
Tidewater Oil Company
Yong-Nam Chemical Company, Ltd.

LION OIL CO.

Parent:

Tosco Corporation

Subsidiaries of Tosco Corporation:

AZL Resources, Inc.
Arizona-Florida Land & Cattle Company
AZCO Properties, Inc.
AZL Engineering, Inc.
AZL Minerals, Inc.
AZL Petroleum Corp.
AZL Ranches, Inc.
Breckenridge Nordic Village Corporation
CVL Liquidating Company
The Baca Grande Corporation
The Baca Services Company
Diablo Service Corporation
Lion Oil Company
Lion Oil Trading Company, Ltd.
Sand Wash Development Corporation
The Oil Shale Corporation
The Oil Shale Corporation (Australia)
The Oil Shale Corporation (Qld) Pty. Ltd.
Tosco Communities Corporation
Tosco Corporation
Tosco Development Corporation
Tosco Employees Association (Not a Subsidiary)
Tosco Enhanced Oil Recovery Corporation
Tosco International Corporation
Tosco International Energy Corporation

Tosco International Finance N.V.
Tosco Mining, Inc.
Tosco Production Finance Corporation
Tosco Services and Development, Inc.
Tosco Trading, Transportation and Supply, Inc.
Toscopetro Corporation
ToscoTech Corporation
Western Hemisphere Corporation

PACIFIC REFINING CO.

Parent:

The Coastal Corporation

Subsidiaries of The Coastal Corporation

ABCO Aviation, Inc.
ABCO Leasing, Inc.
The Belcher Company of New York, Inc.
The Belcher Company of Tennessee, Inc.
Belcher New England, Inc.
Belcher Oil Company
Belcher Terminals, Inc.
Belcher Towing Company
Belgische Petroleum Raffinaderij N.V.
Border Exploration Company
CIC Industries, Inc.
CIG-Canyon Compression Company
CIG Clearing House Company
CIG Exploration, Inc.
CIG Gas Supply Company
CIG Overthrust, Inc.
Coastal (Bermuda) Limited
Coastal Capital Corporation
Coastal Coal Sales Company
Coastal Congo Exploration Limited
The Coastal Corporation
Coastal Energy Corporation

Coastal Finance Corporation
Coastal Financial Antilles N.V.
Coastal Financial B.V.
Coastal Hercules, Inc.
Coastal Libya Exploration Limited
Coastal Libya, Inc.
Coastal Limited Ventures, Inc.
Coastal Management Services (Singapore) Pte. Ltd.
Coastal Netherlands Financial B.V.
Coastal Offshore Insurance Ltd.
Coastal Oil & Gas Corporation
Coastal Papua New Guinea Exploration, Inc.
Coastal Petroleum (Far East) Pte. Ltd.
Coastal Refinery Marketing B.V.
Coastal Refining Company
Coastal Refining & Marketing, Inc.
Coastal States Crude Gathering Company
Coastal States Energy Company
Coastal States Exploration Services Limited
Coastal States Holdings (U.K.) Limited
Coastal States Management Corporation
Coastal States Petroleum (U.K.) Limited
Coastal States Trading, Inc.
Coastal States Tankers (U.K.) Limited
Coastal Tankships U.S.A., Inc.
Coastal Uranium, Inc.
Coastal Ventures, Inc.
Cody Gas Company (Division)
Colbourne Insurance Company Limited
Colorado Interstate Corporation
Colorado Interstate Gas Company
Coordinating Committees, The Coastal Corporation and Domestic Subsidiaries
Cosbel Petroleum Corporation
Coscol Marine Corporation
Coscol Petroleum Corporation

Costa Petro
Derby Realty Corporation
Derby Refining Company
Geogas Enterprise S.A.
Holborn Oil Company Limited
Holborn Oil Trading Limited
Holborn-Pomona Petroleum Limited
Jayhawk Pipeline Corporation
Manatee Towing Company
McCoy Camey Coal Company
Mountain Industrial Gas Company
Pacific Refining Company
Pomona Shipping Company Limited
Southern Utah Fuel Company
Stonehurst Limited
Subtype Limited
Texas Tank Ship Agency, Inc.
Texcol Gas Services, Inc.
Utah Fuel Company
Western Fuel Oil Company
Woodstock Shipping Company Limited
Wycon Chemical Company
Wyoming Gas Supply, Inc.
Inactive Subsidiaries

SHELL OIL COMPANY

Parents:

SPNV Holdings, Inc.
Shell Petroleum N.V. (The Netherlands)
Royal Dutch Petroleum Company (The Netherlands)
The Shell Transport and Trading Company (England)

Subsidiaries of Shell Oil Company:

Compania Shell de Exploracion de Colombia
IND/AG Chemicals, Inc.
Pecten Chemicals Inc.

Pecten Limited
  Pecten Arabian Limited
  Pecten Cameroon LNG Limited
  Pecten Curacao N.V.
    Bullenbay Marine Services N.V.
    Curacao Oil Terminal N.V.
  Pecten Ventures Limited
PICO LIMITED
Pecten Middle East Services Company
Pecten Philippines Exploration Company
Pecten Trading Company
  Oil Companies Institute for Marine Pollution
    Compensation Limited
Pecten Vietnam Company
Pecten Vietnam Petroleum Company
Quazite Corporation
  General Hydrocarbons Polymer Concrete Inc.
  Plastibeton, Inc.
  Polycon Research, Inc.
  Polymer Concrete Research, Inc.
Rampart Packaging Inc.
SES, Incorporated
Shell Capital, Inc.
Shell Communications, Inc.
Shell Credit, Inc.
Shell Energy Resources Inc.
  Pecten International Company
    Pecten Bahamas Company
    Pecten Belize Company
    Pecten Brazil Alagoas Petroleum Company
    Pecten Brazil Amazon Company
    Pecten Brazil Amazon Exploration Company
    Pecten Brazil Amazon Exploration
      and Development Company
    Pecten Brazil Amazon Petroleum Company

Pecten Brazil Bahia Company
Pecten Brazil Bahia Exploration Company
Pecten Brazil Bahia Exploration
and Development Company
Pecten Brazil Exploration Company
Pecten Brazil Exploration and
Development Company
Pecten Brazil Maranhao Company
Pecten Brazil Maranhao Exploration Company
Pecten Brazil Para Petroleum Company
Pecten Brazil Petroleum Company
Pecten Brazil Rio Grande De Norte Company
Pecten Cameroon Company
Pecten Egypt Petroleum Company
Pecten Equatorial Guinea Company
Pecten Malyasia Company
Pecten Orient Company
Pecten Overseas Petroleum Company
Pecten Paraguay Company
Pecten Potiguar Company
Pecten Santos Company
Pecten Santos Exploration Company
Pecten Santos Petroleum Company
Pecten Somalia** Company
Pecten Spain Company
Pecten Syria Company
Pecten Syria Petroleum Company
Pecten Thailand* Company
Pecten Tunisia Company
Pecten Victoria Company
Shell Explorer Company
Taranaki Offshore Petroleum Company
Taranaki Offshore Petroleum Company Limited
Shell California Production, Inc.
Belridge Oil Company
Belridge Farms

Belridge Packing Co.
Thums Long Beach Company
Shell Mining Company
Shell Offshore Inc.
Blue Dolphin Pipe Line Company
Burrwood Gathering Company
Shell Western E&P Inc.
Shell Export Company
Shell Investment, Inc.
Shell Motorist Club, Inc.
Shell Pipe Line Corporation
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Basin Pipe Line System
Ozark Pipe Line System
Rancho Pipe Line System
Capline System
Capwood Pipe Line System
Ship Shoal Pipe Line System
Crown-Shell Baytown Feeder Line System
Triton Biosciences Inc.
Western Farm Service, Inc.
Pioneer Equipment Co.

Affiliates of Shell Oil Company:
First Harlem Securities Corporation
Fractionation Research, Inc.
George Newman & Co.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation

LOOP, Inc.
Lucky Chance Mining Company, Inc.
MESBIC Financial Corporation of Houston
  Oil Companies Institute for Marine Pollution
  Compensation Limited
Oil Insurance Limited
Seadock, Inc.
Shell Mining Company
  Bellaire Trucking Company
  Pecten Coal International Inc.
  Seaway II Coal Company
  Triton Coal Company
  Turris Coal Company
Shell Western E&P Inc.
  Chaparro Gathering Company
  Choctaw Pipe Line Company
  East Texas Salt Water Disposal Company
  Grand Ecallie Land Company, Inc.
  Shell Cortez Pipeline Company
    Cortez Capital Corporation
  Van Salt Water Disposal Company
  WIDC (Wyoming Industrial Development
    Corporation)

STANDARD OIL COMPANY OF CALIFORNIA (NOW CHEVRON CORPORATION)

Subsidiaries and Affiliates

American Gilsonite Company
American Transport Company
Arabian Chevron Trading Company
Arabian Chevron, Inc.
Bahama California Oil Company
Belize Chevron Oil Company
Blue Hills Services Company (Dissolved 08-24-83)
Cal-Ky Pipe Line Company

California (Nigeria), Incorporated
California Asiatic Oil Company
California Ecuador Petroleum Company
California Oil Company of Australia
Chandeleur Pipe Line Company
Chevron Amazon Petroleum Company
Chevron Bahia Petroleum Company
Chevron Bahia Sul Petroleum Company
Chevron Chemical Company
Chevron Chemical Pan American Company
Chevron Coal Development Company
Chevron Corporation (Incorporated 12-29-83)
Chevron Environmental Health Center Inc.
Chevron Exploration Corporation
Chevron Exploration Corporation of Chile
Chevron Exploration Corporation of Sudan
Chevron Fibers, Inc.
Chevron Foreign Service Corporation
Chevron Functional Fluids, Inc.
Chevron Geothermal Company of California
Chevron Guaratuba Petroleum Company
Chevron Iguape Petroleum Company
Chevron Indonesia Oil Company
Chevron Industries, Inc.
Chevron International Oil Company, Inc.
Chevron Investments (Netherlands) Inc.
Chevron Itajai Petroleum Company
Chevron Jambi Inc.
Chevron Land and Development Company
Chevron Langsa Inc.
Chevron Maranhao Petroleum Company
Chevron Murzuk Inc. (Dissolved 07-29-83)
Chevron Oil Latin America, Inc.
Chevron Oil Sales Company
Chevron Oil Service Company

Chevron Oil Trading Company
Chevron Orient Inc.
Chevron Overseas Finance Company
Chevron Overseas Petroleum Inc.
Chevron Petroleum (U.K.) Limited
Chevron Petroleum Company of Brazil
Chevron Petroleum Company of Colombia
Chevron Petroleum Company of Denmark
Crevron Petroleum Company of Greenland
Chevron Petroleum Company of Norway
Chevron Petroleum Service Company
Chevron Pipe Line Company
Chevron Porto Belo Petroleum Company
Chevron Research Company
Chevron Sao Luis Petroleum Company
Chevron Sao Marcos Petroleum Company
Chevron Shale Oil Company
Chevron Shipping Company
Chevron Singkarak Inc.
Chevron Solemar Petroleum Company
Chevron Standard Limited
Crevron Stations, Inc.
Chevron Telecommunications Company
Chevron Travel Club Services Company
Chevron Travel Club, Inc.
Chevron U.S.A. Inc.
Chevron Ubatuba Petroleum Company
Chevron Venezuela Services Inc.
Community Oil Company, Inc.
Compania Minera Chevron, Inc.
Compania Petrolera Chevron
Compania Petrolera Chevron Ecuador
Compania Petrolera Chevron El Salvador
Compania Petrolera Chevron Guatemala
Compania Petrolera Chevron Honduras

Compania Petrolera Chevron Nicaragua
Compania Petrolera Chevron, Ltd. (Nevada)
Cuba California Oil Company
Dominion Oil Limited (Nevada)
Eastern Transport Corporation
Eaton Shale Company
Federal Acquisitions, Inc.
Federal Engineering Corporation
Garfield County Exploration Company
Gasolinas Chevron de Puerto Rico Inc.
Hoffman Fuel Company, Inc.
International Bitumen Emulsions Corporation
Iran Chevron Oil Company
Kelmac, Inc.
Kenai Service Company
Kentucky Agricultural Energy Corporation
Murvale Company
P D Q Oil Company
Pacific Coast Homes
Pacific Document Services, Inc.
Pacific Oil Company
Panoche Services Company
(Dissolved 08-24-83)
Petroleum Buildings, Inc.
Petroleum Facilities, Inc.
Ra-Pid-Gro Corporation
Refiners Oil Corporation
Richmond Oil Company
Rye Fuel & Supply Company, Inc.
Sepulveda Properties, Inc.
Shale Oil Syndicate, Inc.
Socal Oil & Refining Company
Stanavo Specification Board, Inc.
(Dissolved 10-31-83)
Standard Directional Drilling Company

Standard Gas Company
Standard Gasoline Company
Standard Oil Company (Alaska)
Standard Oil Company (Arizona)
Standard Oil Company (California)
Standard Oil Company (Idaho)
Standard Oil Company (Kentucky)
Standard Oil Company (Oregon)
Standard Oil Company (Texas)
Standard Oil Company (Utah)
Standard Oil Company (Washington)
Standard Oil Company of Delaware
Standard Oil Company of Texas, Inc.
Standard Oil Company, Ltd.
Standard Oil Sales Co., Inc.
Standard Pipe Line Company (California)
Standard Pipe Line Company (Nevada)
The California Company
The Ontario Center
The Red Wing Oil Company
The Western Company
Vectra Corporation (Dissolved 03-02-83)
Wallis & Co., Inc.
Western Transnav Company

UNION OIL COMPANY OF CALIFORNIA

Parent:

Unocal Corporation

Subsidiaries of Union Oil Company of California

Ace Gas, Incorporated
Alfa Oeste Empreendimentos Participacoes E Servicos S/C Ltda.
Allstate Oil Company
American Mineral Spirits Company

AMSCO International, Inc.
Arizona Refining Company
Automatic Heat Co., Inc.
Bardevco, Inc.
Barracuda Tanker Corporation
Brea Agricultural Service, Inc.
Breton Resources Company
Bunker Corporation
Canair Molybdenum Corporation Ltd.
Casmite Corporation, The
Coalinga Tanker Corporation of California
Coalinga Tanker Corporation of Liberia
Collier Carbon and Chemical Corporation
Consumer Service Company
Costa Oeste Mineracao Ltda.
Cymoly Corporation
Elm Corporation
Eugene Shoal Oil Company
Geocon, S.A.
Golf Road Corporation
Gravity Adjustment, Inc.
Hemphill Oil Company
Honduroro, Inc.
Los Angeles Oil Company, The
Mardevco, Inc.
Miami Valley Corporation
Mid-County Chemical Co.
Minera Unionoil Chile Limitada
Minerals Exploration Company
Minerals Exploration Company New Zealand, Ltd.
Minerals Exploration Pacific, Ltd.
Molycorp, Inc.
Molycorp International
Molycorp Nebraska, Inc.
Molycorp S.A.R.L.

Moreland Development Company
Moreland Investment Company
Moreland/Hapsmith Partnership
Moreland/John Martin Company
Moreland Northwest Company
Moreland/Pulley
Moreland/Tarnutzer-Hamilton
Northwestern Oil Company
Obed Mountain Coal Company, Limited
P-M-S West, Inc.
Pacific Coast Hemphill Oil Company
Pacific Coast Oil Company
Pacific Coast Oil of Tacoma, Inc.
Pacific Northwest Land Company
Peru Oriente Petroleum, Ltd.
Philippine Geothermal, Inc.
Poco Graphite, Inc.
Power Plant Engineering Company of Seattle
Pure Fuel Oil Company, The
Pure Oil Company of Venezuela, Inc.
Pure Oil Corporation, The
Pure Transportation Company
Puregro Company
Puritan Agency, Incorporated, of Illinois
Ramseur Fuel Oil Company
Route 58 Corp.
Royal Triton Company
Sanitation Inc.
Seacrest Drilling Company
Sepulveda Oil & Gas Company
Seventy-Six Auto/Truck Stop Corporation
Southcap Pipe Line Company
Stadevco, Inc.
Superior Deshler Co.
Union Alaska Pipeline Company

Union California Pipeline Company
Union Central Java Geothermal, Ltd.
Union of Colombia, Limited
Union Geotermica Italiana S.P.A.
Union Geothermal Company of New Mexico
Union Geothermal Guatemala, Limited
Union Geothermal of Indonesia, Ltd.
Union Geothermal Japan, Ltd.
Union Geothermal of The Philippines, Inc.
Union Kuparuk Pipe Line Company
Union Minerals Norge A/S
Union West Java Geothermal, Ltd.
Union Oil Adriatica, S.P.A.
Union Oil Credit Corporation
Union Oil Development Corporation
Union Oil Export Sales Corp.
Union Oil Holdings Limited
Union Oil Limited
Union Oil Telecommunications, Inc.
Union Oil Transportation B. V.
Union Oil Company — Eastern Hemisphere
Union Oil Company of Bangladesh
Union Oil Company of California
Union Oil Company of Canada Limited
Union Oil Company of Central America
Union Oil Company of Egypt
Union Oil Company of Guatemala
Union Oil Company of Honduras
Union Oil Company of Indonesia
Union Oil Company of Iran
Union Oil Company of Nevada
Union Oil Company of Nigeria
Union Oil Company of Peru
Union Oil Company of Thailand
Union Oil Company of The Netherlands

Union Oil Company of Venezuela
Union Oil Company of West Africa
Unionoil Adriatic, Inc.
Unionoil Amazonas, Ltd.
Unionoil Atlantico, Ltd.
Unionoil Australia Mining Pty. Ltd.
Unionoil Bahia, Ltd.
Unionoil Brazil, Ltd.
Unionoil Exploracao De Petroleo Ltda.
Unionoil International Exploration Company, Ltd.
Unionoil Ireland Limited
Unionoil Japan Limited
Unionoil Java Sea, Ltd.
Unionoil Kenya, Ltd.
Unionoil Madagascar, Ltd.
Unionoil Maranhao, Ltd.
Unionoil Norge A/S
Unionoil Orient, Ltd.
Unionoil Offshore Exploration, Ltd.
Unionoil Overseas Finance N.V.
Unionoil Pakistan, Ltd.
Unionoil Philippines International, Inc.
Unionoil Sao Luis, Ltd.
Unionoil Suez, Ltd.
Unionoil Teweh, Ltd.
Unionoil Zeit, Ltd.
Unionoil Company of Great Britain
Unionoil Company of Kalimantan
Unionoil Company of Spain
Unocal Corporation (Wyoming)
Unocal Exploration & Production Co. (UK) Ltd.
Unoco (Hong Kong) Limited
Unoco Limited
USZ Associates
USZ Hotel Venture

Van Salt Water Disposal Company
West Coast Shipping Company
Wisconsin Independent Oil Company
Woodland Development Corporation

WESTERN OIL AND GAS ASSOCIATION
None

Respectfully submitted,
PHILIP K. VERLEGER
Counsel of Record
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK, VERLEGER & SHEA

Counsel for Appellees Western Oil and Gas Association, et al.

(5)

No. 84-16

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. McCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,

Appellants,

v.

WESTERN OIL & GAS ASSOCIATION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE FOR THE CITIES OF SANTA MONICA, CULVER CITY, TORRANCE AND HUNTINGTON BEACH

IN SUPPORT OF REVERSAL

BERT GLENNON, JR.
City Attorney
Culver City, California

STANLEY E. REMELMEYER
City Attorney
Torrance, California

GAIL HUTTON
City Attorney
Huntington Beach, California

ROBERT M. MYERS
City Attorney
Counsel of Record

STEPHEN S. STARK
Assistant City Attorney

KARL M. MANHEIM
Deputy City Attorney
1685 Main Street
Santa Monica, California 90401
Telephone: (213) 458-8336

Attorneys for Amici Curiae

Westside Law Publishers Los Angeles, California (213) 477-0491

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No. 84-16

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Appellants,

v.

WESTERN OIL & GAS ASSOCIATION, et al.,

Appellees.

BRIEF OF AMICI CURIAE FOR THE CITIES OF SANTA MONICA, CULVER CITY, TORRANCE AND HUNTINGTON BEACH

This brief is filed pursuant to Rule 36.4 of the Rules of the Supreme Court.

INTEREST OF AMICI

Amicus curiae City of Santa Monica ("City") is a political subdivision of the State of California. The City, under a charter authorized by the California Constitution, is a body corporate and politic, exercising governmental powers over matters within its jurisdiction and proprietary powers over property which it holds.

There is now pending in the United States District Court for the Central District of California an action entitled *Shell Oil Company v. City of Santa Monica*, Case No. CV 82-2362-RJK. This action would compel the City to grant a franchise to Shell to operate a crude oil pipeline beneath City streets on terms favored by Shell.[1] Shell claims a right of action directly under the Commerce Clause to compel the franchise on economic and safety terms that the City has determined to be inimical to the public health and welfare. The decision in the case at bar could directly affect the decision in *Shell v. City*; indeed, a tentative decision in the City's favor on its motion for judgment on the pleadings on Commerce Clause issues was reversed by the District Court in light of the Ninth Circuit opinion below.

This brief addresses two related issues of fundamental concern to the City and to municipalities generally.[2] First is the principle that the State in leasing land for marine terminal locations is acting as a "market participant" and not as a market regulator subject to Commerce Clause scrutiny. Second is the concept that the negative implications of the Commerce Claus should not be interpreted to compel affirmative action by a State in furtherance of commerce.

The California cities of Culver City, Torrance, and Huntington Beach, each of which grants subsurface pipeline rights to oil companies, join Santa Monica in this amicus brief in support of appellants.

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[1]A previous 40-year franchise agreement between the City and Shell expired in 1981.

[2]Appellees have obtained oil pipeline franchises from scores of California cities which are similarly situated to Santa Monica. *See. Gulf Oil Corp. v. City of Huntington Beach*, Case No. CV 80-5709-RMT (C.D. Cal) (settled and dismissed). Many of those franchises are up for or nearing renewal.

SUMMARY OF ARGUMENT

1. The State, in leasing land for marine terminals, is a market participant and not a regulator. It does not enjoy a monopoly over suitable sites; the opinion below reached its conclusion of monopoly status by defining the relevant market conveniently to the result reached. Further, even if the State has a monopoly of the relevant market, its activites are distinct from regulatory and taxing functions subject to the Commerce Clause, although other constitutional and legislative constraints may apply. The opinion below contradicts recent decisions of this Court regarding the market participant doctrine and ignores their salutary principles.

2. The negative implications of the Commerce Clause have been taken to preclude states from interfering with interstate market forces by burdensome taxation or regulation. They have not heretofore been construed to require a state to enter into a contract with a private party on terms said to promote commerce. A state has no obligation to convey an interest in its property whenever an entity invokes the Commerce Clause to facilitate its interstate or foreign operations. The reach of the "great silences" of the Commerce Clause should not be extended to require judicial supervision over the terms of contracts regarding government property; the concept is a radical break from precedent and portends far-ranging pernicious effects on the States and the courts.

ARGUMENT

Appellees, several oil companies involved in interstate and foreign commerce and their trade association ("oil companies"), lease land from appellant, State Lands Commission ("State"), for marine terminal sites adjacent to their refinery facilities. The relationship between the oil companies and the state is of a traditional contractual nature. The oil companies object to the State's rental regulation authorizing a volumetric form of rent. They claim that several constitutional provisions prohibit this rental formula and that they are entitled to enter into and renew leases using a rental mode more favorable to them. In essence, the oil companies invoke the Commerce Clause and related constitutional provisions as super bargaining tools to (1) ensure lease renewal and (2) set lease terms. This perverts the meaning and purpose of the Commerce Clause.

The issue would be entirely different were Congress to assume the plenary authority granted it by the Constitution to legislate in this area, as by prescribing locations for marine terminals and pipeline routes, or setting rents. Yet, no such legislation is invoked.[3] Rather, it is only the "negative implications" of the Commerce Clause which the oil companies invoke to require the State to enter and renew their leases for a fee equivalent to the State's cost.

[3]Indeed, Congress has already considered and rejected federal authority regarding pipeline routing. *See* 49 U.S.C. §2001(4) (Hazardous Liquid Pipeline Safety Act) ("this chapter does not authorize the Secretary [of Transportation] to prescribe the location or the routing of any pipeline facility").

I

THE COMMERCE CLAUSE DOES NOT RESTRAIN THE EXERCISE OF STATE PROPRIETARY POWERS

The touchstone of Commerce Clause scrutiny is sovereign behavior by the State. If the State acts to impede foreign or interstate commerce, the Clause prohibits discriminatory or impermissible burdens. The principle is rooted in basic tenets of federalism and separation of powers with two major qualifiers: (1) There must be state action to warrant judicial intervention directly under the Commerce Clause; (2) The state action must be sovereign in nature, and not the simple disposition of the state's property.

A. The Market Participant Doctrine.

In *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), this Court established the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause. As said in *Reeves* and re-affirmed in *White v. Massachusetts Council of Construction Employees*, ___ U.S.___ 75 L.Ed.2d 1 (1983),

> The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. As that case explains, the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the nation marketplace. [citation omitted] There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. *Reeves v. Stake*, 447 U.S. at 436-437; quoted in

> *White v. Massachusetts Council of Construction Employees,* 75 L.Ed.2d 1 at 5-6.

The market participant doctrine recognizes that, in various contexts, states may be indistinguishable from private parties competing for the offering or purchase of goods, rights and services. Thus, in *Hughes v. Alexandria Scrap Corporation,* 426 U.S. 794 (1976), this Court reversed a three-judge District Court's use of the traditional Commerce Clause balancing test in analyzing a state scheme to subsidize the purchase of abandoned automobiles.

> This line of reasoning is not without force if its basic premise is accepted. That premise is that every action by a State that has the effect of reducing in some manner the flow of goods in interstate commerce is potenially an impermissible burden. But we are not persuaded that Maryland's action in amending its statute was the kind of action with which the Commerce Clause is concerned. *Id.* at 805.

In *Reeves,* this Court also noted that considerations of state sovereignty cautioned that the Commerce Clause should be applied with restraint.

> [W]hen acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause. Finally, as this case illustrates, the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. Given these factors, . . . the adjustment of interests in this context is a task better suited for Congress than this Court. 447 U.S. at 439 (citations omitted).

See also Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 896 (1961) (a governmental entity enjoys greater authority as a proprietor than it does simply as a law maker); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases"); *Fidelity Guarantee Mortgage Corp. v. Connecticut*, 532 F. Supp. 81, 84-85 (D.Conn.1982) (Commerce Clause analysis is not necessary because "the activity challenged . . . is not state regulation of interstate commerce, but rather state participation in the market place . . . . State proprietary activities . . . are subject to the same governmental restrictions as private parties").

This Court has also recognized proprietary-regulatory distinctions in the operation of municipal transportation facilities. Thus, in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635 n.14 (1973), the Court noted that while a municipality might not regulate air traffic pursuant to its police power, as proprietor of an airport, it was not subject to the same limitations. *See also South Carolina v. Barnwell Bros.*, 303 U.S. 177, 185 (1938) ("notwithstanding the commerce clause . . . regulation [of matters of local concern] in the absence of Congressional action has for the most part been left to the states"); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981) (the "power of a municipal proprietor to regulate the use of its airport is not preempted by federal legislation").

Most recently, in *South-Central Timber Development, Inc. v. Wunnicke*, ___ U.S. ___, 81 L. Ed. 2d 71 (1984), this Court, while holding that a "downstream regulation" requiring timber from state lands to be

processed within the state prior to export violated the Commerce Clause, reaffirmed the basic principle of the market participant doctrine developed in *Alexandria Scrap, Reeves,* and *White.* "If a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limit on its activities". *Id.* at 80.

Thus, the market participant doctrine as developed over recent years is an articulation of a basic constitutional tenet — proprietary activities of state and local government do not have the potential for disrupting national commerce or "Balkanizing" the economy. *Cf. Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979)

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. *Gibbons v. Ogden,* 9 Wheat. 1, 195 (1824).

B. The State Is A Participant In The Market For Suitable Land.

As a basic proposition, rent for the use of land is neither a tax nor a downstream regulation. The State is not requiring payment from anyone with whom it does not directly contract. Leases of government property seems to fit squarely within the concept of the State's "own economic action" found exempt from Commerce Clause scrutiny in *White v. Massachusetts Council of Construction Employees,* ____ U.S. ____, 75 L. Ed. 2d 1 (1983).

> [T]he distinction between participation and regulation rests on core notions of state sovereignty,

> coupled with the traditional rights of private traders to determine the identities of their bargaining partners free from governmental interference. The legitimacy of a claim to the market participant exemption thus should turn primarily on *whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt,* analogous to the accustomed right of merchants in the private sector, *to govern the State's own economic conduct and to determine the parties with whom it will deal. Id.* at 13 (Blackmun, J., dissenting) (citations omitted, emphasis added).

The court below rejected market participant exemption because of the State's perceived "monopolistic position over the sites used by the oil companies." Jurisdictional Statement Appendix, p. A-6. This holding is premised on both factual and analytical errors. First, with respect to coastal land available for marine terminal sites, the State does not have a monopoly. Second, even if a monopoly as to particular tracts of land is assumed, the State is promoting its own economic interests and not regulating downstream markets subject to Commerce Clause scrutiny.[4] The character of the state action should dictate whether the State is participant or regulator; in this case the State action is proprietary in nature, concerning only contracts for the use of State land by particular private companies.

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[4]There are constraints such as the antitrust laws on monopoly excesses. As this court recognized in *Jefferson County Pharmaceutical Ass'n Inc. v. Abbott Labs,* ____ U.S. ____ 74 L.Ed 2d 882, 888 (1983), if the State is a monopolist in a proprietary capacity, it too may be subject to antitrust limitations. Thus the Court of Appeals' latent concern that the State might abuse a monopoly position without safeguards is illusory.

1. The State Does Not Have A Monopoly.

Implicit in the lower court's conclusion of monopoly status is the premise that the State is exercising the sort of regulatory powers requiring Commerce Clause scrutiny. But the court fails to distinguish between a market participant who may enjoy monopoly status in a narrowly defined market and true governmental regulation that affects all traders within the jurisdiction. Acceptance of the court's reasoning, coupled with a view "that the particular tract involved in each purchase or lease itself constitutes the relevant market" (*Northern Pacific Ry. v. U.S.* 356 U.S. 1, 18 (1958) (Harlan, J. dissenting)), could lead to untoward results. Thus, each landowner becomes a mini-monopolist subject to Commerce Clause scrutiny even without Congressional action. This Court should be wary of adopting a rule defining markets so narrowly as to convert every property holder into a monopolist and every contract condition into a "downstream regulation." The relevant market in this case is land suitable for marine terminals, not the particular parcels in question.

Market definition is critical to monopoly determination. In *South-Central Timber Development, Inc. v. Wunnicke,* ___ U.S. ___ 81 L. Ed. 2d 71 (1984), this Court cautioned against defining a market so broadly that it embraced both a market in which the state participated (raw timber) and a market in which the state was not participating (processed timber). The Court agreed with the timber company that although Alaska is a participant in the raw timber market, it was using its leverage in that market to exert a regulatory effect in the timber processing market, in which it is not a participant. *Id.* at 83. Alaska's "primary manufacture" regulation was motivated by its concerns as *parens patriae* over the general welfare and not by the business interests of the State as an economic

entity.[5] Thus, the conditions placed on timber buyers were held to be "downstream regulations" on timber processing not exempt from Commerce Clause scrutiny. This key factor is not present here. California participates only in the leasing of its land; it is not imposing any conditions on the recovery, transportation or refining of petroleum products. The State is acting in a classic business capacity, attempting only to obtain a fair rental value for its own property.

The oil companies seem to believe that interstate commerce in crude oil is absolutely dependent upon use of their existing refineries, terminals and pipelines. Thus, they see expedient access to those facilities as the *sine qua non* for commerce. They fail to appreciate, however, that the notion of commerce embodied in the Commerce Clause is not defined in terms of particular firms, facilities, or even marketing systems. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127-128 (1978), (the Commerce Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations).

While the oil companies may desire to use State lands to reach these particular refineries, they do not have to do so in order to engage in commerce in California. Since the oil companies may obtain property rights from other public

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[5]Moreover, the character of the restraint in *Wunnicke* is significant. The Court referred to the "protectionist nature of Alaska's local-processing requirement" and cited a line of cases "view[ing] with suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." 81 L.Ed.2d 71, 84-85 citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 145 (1970); *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928). Thus, the cases and commentators place emphasis on the "reasons for which the regulations were imposed." Tribe, *American Constitutional Law,* 328 (1977).

and private land holders without disrupting interstate commerce, the State is no more of a monopolist than is any landlord to its tenant. The relevant market for transportation facilities and corridors is the entire coastal strip, because access to California and its markets may be gained from any number of "competitors."[6] The issue is one of commercial convenience rather than practical necessity.

It may be an economic burden on the oil companies to obtain new access to existing refineries (should they not renew their ground leases for marine terminal sites), but that is not a burden on "commerce".

> [W]e are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself. In this context the ordinance is not a burden on interstate commerce, but is merely a 'burden' on a company which happens to have interstate distribution facilities. The effect of the ordinance is that the particular interstate systems of Procter and Gamble and other detergent companies before the passage of the ordinance can no longer be used . . . While this factor might necessitate a change in certain production facilities, it does not rise to the level of an unconstitutional burden on interstate commerce. *Procter & Gamble Co. v. City of Chicago,* 509 F.2d 69, 77 (7th Cir. 1975) *cert. denied,* 421 U.S. 978.

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[6]Pipeline access to refineries may be had through land owned by others including upland property. The Shell pipeline running through Santa Monica is an example of available alternatives. Offshore crude oil enters California at Ventura, some 80 miles north of Shell's Wilmington refinery, and then travels south via pipeline through coastal and inland cities. The precise route chosen may be dependent upon a number of factors. But clearly no single landowner (public or private) monopolizes access to California markets or this particular refinery.

The potential relocation of marine terminal facilities is part of the financial calculus that went into the oil companies' initial siting decisions[7] and one that will enter their decision to renew or seek reissuance of their State leases (as it would in the case of a private lease). If the State has become a monopolist simply by virtue of having granted the leases in the first place, then the market participant doctrine is unavailable after its first use in every context.

If the oil companies are correct that the present location of their facilities conferes monopoly power on the State and requires lease renewal, then their initial leases can never legally terminate. Accordingly, whether the State knew it or not, it conferred perpetual (fee) interests in public property despite the contractual terms. This proposition is untenable, seemingly resulting in a gift of public property for private purposes. Even a public utility has no legal right to maintain its utility lines after expiration of its leases. *Detroit v. Detroit United Railway Co.*, 172 Mich. 136, 137 N.W. 645, (1912), *aff'd* 229 U.S. 39 (1913).

The oil companies' argument is facile and insidious: once they obtain rights in public property, the lease terms become irrelevant. By the force of the Commerce Clause the leases must be renewed with a rental set at the government's actual cost. Fortunately, nothing in the Constitution requires state and local government to so cede public property to private companies.

2. The State Is Not Regulating.

The State's rental formula is set out by adminstrative regulation. But that denomination does not mean that the

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[7]The duration of the lease must surely have been negotiated so as to enable amortization of capital in the event no new lease was issued at the expiration of the current term. It is the same concern that every commercial tenant has in bargaining for lease terms long enough to amortize investment and moving costs.

state activity constitutes "regulation" for Commerce Clause purposes.[8] A critical factor in determining application of the market participant doctrine is whether interstate traders must subject themselves to state authority as an incident to engaging in commerce. Thus, if the oil companies were unable to bring crude oil into California unless they submitted to State requirements, the State's impact would go beyond an immediate contractual relationship with the oil companies. In that case the State's influence would be more far reaching; it would inhibit the oil companies' engagement in commerce entirely. Then, traditional Commerce Clause analysis would be appropriate. *South-Central Timber Development, Inc. v. Wunnicke* ___ U.S. ___, 81 L.Ed. 2d 71 (1984).

What makes a particular exercise of authority regulatory in nature is its pervasive effect on interstate traders. Only when the state acts in its sovereign capacity is it able to affect all traders in a particular commodity. Thus, whether a state is regulating or participating may not turn on traditional concepts of fee ownership in land. Rather, it is the way the state uses its ownership interest vis a vis commerce that prompts Commerce Clause analysis.

The distinction between participating in and regulating the market is well illustrated by comparing the instant case to *Haskell v. Cowham*, 187 F. 403 (8th Cir. 1911), and *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Those cases involved Oklahoma statutes which prevented the exportation of all natural gas. The vehicle Oklahoma chose for its economic protectionism was legislation which prohibited construction of pipelines under or across

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[8] "Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444 (1960) (citations omitted).

state highways. Since such highways formed a perimeter boundary, and pipeline was the only means of transportation available to the industry, local producers were effectively prohibited from marketing their product in other states. The Oklahoma statute made interstate commerce "impossible."

> Interstate commerce in natural gas is absolutely prevented, — prohibited . . . and to prohibit interstate commerce is more than to indirectly affect it. Every provision of the statute is directed to such result. . . .
>
> The statute presents no embarassing questions of interpretation. It was manifestly enacted in the confident belief that the state had the power to confine commerce in natural gas between points within the state, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such ends. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 249-50 (1911).

The facts in the instant case are a far cry from the economic protectionism cases which have merited strict application of Commerce Clause safeguards. Instead here the State is acting precisely as one would expect of a market participant—seeking fair rental value for its property. Its challenged rental mode is neither designed to discriminate against interstate commerce, nor does it have that effect. Most importantly for this analysis, the State's actions go no further than the immediate lease arrangements with the oil companies. They have no "regulatory" impact on downstream relationships, nor do they affect the oil companies' other lease arrangements with landholders within California. The rental charged is a direct incident of the property interest obtained by the oil companies.

In the instant case no discrimination in favor of local oil companies (or similar enterprises) appears. "Economic protectionism" is simply not an issue here.

> Especially when such measures do not discriminate on their face between in-state and out-of-state enterprises, not even a heavy burden on out-of-state enterprises is likely to result in their invalidation. . . . Tribe, *American Constitutional Law*, 329.

See also Sporhase v. Nebraska, 458 U.S. 941, 956 (1982) ("for Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulations on the other").

3. The State Is Not Taxing Commerce

Taxes are analogous to regulations in their impact on commerce. Consequently, this Court has employed the same standards and terminology in determining Commerce Clause challenges to state taxes. *See, e.g., Galveston, H. & S.A.R. Co. v. Texas*, 210 U.S. 217 (1908). An important common thread is that taxation, like regulation, is an act of the state as sovereign. *Case of the State Freight Tax*, 15 Wall. 232, 278 (1873).

This Court has long been concerned with taxes which interfere with the right to interstate travel and commerce. *Crandall v. Nevada*, 6 Wall. 35 (1867). The basic concern is that, unless the taxed activity is discretely local, the interstate activity could be subject to multiple taxation, possibly destroying it. *Id.* at 46. Without the protection of the Commerce Clause in such cases, interstate commerce "would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938). It is the extraterritorial effect of taxes and regulations which

violates the Commerce Clause. Taxes attributable to local aspects of interstate commerce, however, are constitutional. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Despite these principles, the oil companies argue that rent for the use of State land is a tax. By doing so, the oil companies hope to limit the "tax" to merely offset the State's cost of providing land. They are wrong on two accounts. First, a charge for the use of land is not a tax. It is a rental for the private exclusive use of State land.[9] The Commerce Clause does not prohibit the State from generating revenue through the leasing of its own property. Second, even construed as a tax, such fees are directly attributable to exclusively local aspects of commerce. No other governmental entity will "tax" the oil companies for their leases of State lands. The State does not "tax" the oil companies for their leases with other parties.

Rent for an exclusive right for the permanent private use of public property is neither a tax nor a toll. This principle is best understood by those authorities which hold that a lessee with a possessory interest in State property must pay both a rental therefor *and* a property tax for the possessory interest. *See* California Revenue & Taxation Code Section 401; *Forster Shipbuilding Co. v. County of Los Angeles*, 54 Cal.2d 450, 353 P.2d 736, 6 Cal.Rptr. 24 (1960); *Texas Company v. County of Los Angeles*, 52 Cal.2d 55, 338 P.2d 440 (1959).

Since the rental is not a tax, cases such as *Evansville-Vanderburgh Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972), are not authority for limiting the amount

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[9]Not all charges imposed by government constitute a tax. For instance, a charge paid by a franchisee is part of the consideration it undertakes to pay for the privilege of using public property. *Case of the State Freight Tax*, 15 Wall. 232, 278 (1873).

of rental charged. In *Evansville*, this Court upheld fair non-discriminatory taxes on passengers using interstate transportation facilities. The Court reaffirmed *Hendrick v. Maryland*, 235 U.S. 610 (1915), holding:

> Where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. *Evansville* at 405 U.S. 624.

Further, there is a material distinction between the passengers embarking on interstate travel in *Evansville* and the oil companies' use of public lands. In the former case, the charge is levied directly on the act of interstate commerce — flying out of State. While in this case, the oil companies are obtaining possessory interests in property, the rental for which is measured in a customary volumetric formula. Accordingly, there is no suggestion in *Evansville* that the airlines or other airport tenants were entitled to lease their business sites from the municipal proprietor at less than fair market rental.[10] Similarly, there is nothing in other taxation cases which limits rentals for the lease of State property to an amount that merely compensates the governmental entity for costs incurred.

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[10] "In determining the . . . rent it will charge for the use of its properties, a municipal airport authority is acting as the proprietor of the property, and not as a regulatory agency. In making such determinations, the authority is subject only to limitations imposed upon it by statute or by contractual obligations assumed by it." 3 McQuillin, *The Law of Municipal Corporations* Section 11.03a, p. 6.

II
THE COMMERCE CLAUSE DOES NOT MANDATE AFFIRMATIVE STATE ACTION

Where the State sees no public interest in engaging in an activity, there is no reason for it to yield an interest in its land when all it can do is recoup its costs. Thus, the oil companies' argument that the leases cannot constitutionally generate revenue for the State necessarily carries the corollary claim that the State must renew or reissue the expired leases even if it chooses not to.[11] This takes the Commerce Clause in a direction never envisioned by the framers.

Starting with *Cooley v. Board of Wardens,* 12 How. 299 (1852), this Court has consistently interpreted the Commerce Clause as a "self-executing limitation on the power of the States to *enact laws* imposing substantial burdens on . . . . commerce." *South-Central Timber Development, Inc. v. Wunnicke,* ____ U.S. ____, 81 L.Ed 71, 76 (1984) (emphasis added). This "negative implication" stems directly from the framers purpose. *See* Federalist No. 22 (the grant of power to Congress was to suppress the "interfering and unneighborly regulations of some States").

However, nowhere is there any indication that the Commerce Clause, by its own force, was intended to compel a state to take affirmative action in support of commerce. Thus, in the absence of any Congressional expression in this matter, it is only by interpreting in a radically new manner the "great silences of the Consti-

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[11] Although the State has manifested no interest not to reissue the leases, amicus Santa Monica has determined that renewal of the expired Shell franchise (on the terms Shell claims are constitutionally required) is not in the public interest and is not warranted. Thus, whether Santa Monica must renew the franchise at all is a threshold issue in *Shell v. City of Santa Monica.*

tution," *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S 525, 535 (1949), that the oil companies can force lease renewal and terms on the State.[12]

As with Fourteenth Amendment analyses, state inaction is not state action. *See, e.g., Evans v. Abney,* 396 U.S. 435 (1970). For the most part, the courts do not hold governments accountable for their "failure to act." Tribe, *American Constitutional Law,* at 1150.

> [T]he state action requirement reinforces the two chief principles of division which organize the governmental structure that the Constitution creates: federalism and the separation of powers. *Id.* at 1149.

If state inaction is sufficient to trigger court-supervised lease terms, the oil companies will have employed the judiciary to reach public utility status without legislative authorization. Extension of the analysis employed below portends great mischief for governmental entities seeking to derive reasonable value from proprietary assets and enterprises. The historic allocation of powers between governments and among governmental branches would, in the view of amici cities, be altered at the very roots of our federal system.

The oil companies intend to use the Commerce Clause as a sword to compel affirmative state action, rather than as a shield against burdensome and discriminatory regulation. Such a course, tantamount to giving private parties the right of eminent domain in public properties, stands the Constitution on its head.

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[12]Of course, once a state opens an avenue of commerce, it may not discriminate against or impermissibly burden commerce. *Santa Monica Airport Ass'n v. City of Santa Monica,* 479 F.Supp. 927, (C.D. Cal. 1979), *affirmed* 659 F.2d 100 (9th Cir. 1981). However, nothing in the Commerce Clause requires a state to provide a transportation facility or other instrument of commerce in the first place.

CONCLUSION

The Constitution was never intended to compel a State to rent its land at cost to private parties pursuing business gain. Congress has never directed or authorized this sort of "reverse eminent domain." This Court should repair the fabric of the Commerce Clause and restore to the State its basic power to use its own property economically for the general public good. The decision below should be reversed.

November 14, 1984

Respectfully submitted,
ROBERT H. MYERS
City Attorney
Counsel of Record
STEPHEN S. STARK
Assistant City Attorney
KARL M. MANHEIM
Deputy City Attorney
Attorneys for Amici Curiae

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 13, 1984, I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

Philip Verleger
McCutchen, Black, Verleger
& Shea
600 Wilshire Boulevard
Los Angeles, California 90017

John K. Van de Kamp
Attorney General of the
State of California
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
6000 State Building
San Francisco, California 94102

Gail Hutton
City Attorney
William S. Amsbary
Assistant City Attorney
Arthur De La Loza
Deputy City Attorney
2000 Main Street
Box 190
Huntington Beach,
California 92648

Stanley E. Remelmeyer
City Attorney
3031 Torrance Boulevard
Third Floor
Torrance, California 90503

Bert Glennon, Jr.
City Attorney
9770 Culver Boulevard
Culver City, California 90230

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

(6)

No. 84-16

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. McCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE APPELLANTS

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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QUESTIONS PRESENTED

A state regulation prescribing alternative types of rent for ground leases of state-owned property authorizes a form of rent calculated with reference to the volume of commodities moved across the leased land by the lessee. The regulation does not prescribe rates; these are left to case-by-case negotiation.

1. Does the Commerce Clause prohibit such a form of rent, regardless of the rental amount, if the lessee is engaged in interstate or foreign commerce?

2. If the lessee is engaged in foreign commerce, does such a form of rent constitute a tax on imports or exports, in violation of the Import-Export Clause?

3. If the lessee is engaged in interstate or foreign commerce, does such a form of rent constitute a duty of tonnage, in violation of the Tonnage Clause?

PARTIES BELOW

Appellants Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff constitute the current membership of the California State Lands Commission. Appellants McCarthy and Huff are the successors in office to two former members of the Commission who were named in the complaint. Appellees, in addition to the Western Oil and Gas Association, named in the caption, are Pacific Refining Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California, and Union Oil Company of California.

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Kenneth Cory, Leo T. McCarthy, and Jesse R. Huff, members of the California State Lands Commission, *Appellants*,

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Western Oil & Gas Association, et al., *Appellees.*

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A-1-A-13), as modified (J.S. App. A-14), is reported at 726 F.2d 1340. Neither the amended memorandum and order of the district court (J.S. App. A-17-A-25) nor the amended judgment of the district court (J.S. App. A-16) is reported.[1]

[1]The issues of state law raised in the complaint were fully disposed of by the state court of appeal, following an abstention order by the district court. The opinion of the state court of appeal is officially reported at 105 Cal.App.3d 554, and unofficially reported at 164 Cal.Rptr. 468. The judgment of the state superior court (trial court) (J.A. 140-141) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1984 (J.S. App. A-1-A-13), and a timely petition for rehearing with suggestion for rehearing en banc was denied on April 6, 1984 (J.S. App. A-26). The notice of appeal was filed in the court of appeals on April 10, 1984 (J.S. App. A-27-A-28), and the appeal was docketed on July 5, 1984. Probable jurisdiction was noted on October 1, 1984. (J.A. 150.) The jurisdiction of this Court rests on 28 United States Code section 1254(2). (See *John P. King Mfg. Co. v. City Council of Augusta* (1928) 277 U.S. 100, 102-104; *McCollum v. Board of Education* (1948) 333 U.S. 203, 206.)

CONSTITUTIONAL PROVISIONS AND REGULATION INVOLVED

1. The Commerce Clause of the United States Constitution, which provides:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. . . . " (U.S. Const., art. I, § 8, cl. 3.)

2. The Import-Export Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports. . . . " (U.S. Const., art. I, § 10, cl. 2.)

3. The Tonnage Clause of the United States Constitution, which provides:

> "No State shall, without the consent of Congress, lay any duty of tonnage. . . . " (U.S. Const., art. I, § 10, cl. 3.)

4. Section 2003 of title 2 of the California Administrative Code, which sets forth the alternative types of rent

that may be used for ground leases issued by the California State Lands Commission, and which provides:

"2003. Rental.

"(a) Rental for the various categories of use shall be generally as follows:

"(1) Commercial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) A percentage of annual gross income (the percentage being based on an analysis of the market for like uses and other relevant factors);

"(B) 9% of the appraised value of the leased land;

"(C) The volume of commodities passing over the lease premises.

"(2) Industrial Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $250:

"(A) 9% of the appraised value of the leased land together with 2¢ per diameter inch per lineal foot of pipelines and conduits on the leased premises;

"(B) The volume of commodities passing over the lease premises.

"(3) Right-of-Way Use: An annual rental based on any one or combination of the following rental methods with a minimum rental of $100:

"(A) 9% of the appraised value of the leased lands, together with compensation for any damage caused to such lands;

"(B) 2¢ per diameter inch per lineal foot;

"(C) The volume of commodities passing over the lease premises.

". . . . ."
(Cal.Admin.Code, tit. 2, § 2003.)[2]

STATEMENT

This case arises upon a complaint for injunctive and declaratory relief seeking the invalidation of a provision of the leasing regulations of the California State Lands Commission (Commission). (J.A. 6-16.) The challenged provision authorizes the negotiation of rent for ground leases of state-owned real property based upon the volume of commodities put across the leased land by the lessee. (See J.S. App. A-29-A-37.)

1. The Leasing Program of the Commission

The Commission administers various categories of land owned by the State of California. (See Cal. Pub. Resources Code, §§ 6216, 6301.) Some of this land is upland property and is held under special grants from the federal government (e.g., school lands and swamp and overflowed lands); other land is so-called "sovereign land," which was obtained by the State by virtue of its admission to the Union[3] and consists of lands beneath tidal waters as well as the

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[2]The full text of section 2003 and of related sections of the regulations of the State Lands Commission is set forth in Appendix G to the jurisdictional statement (J.S. App. A-29-A-37). Section 2003, with immaterial revisions, is the current version of former sections 2006 and 2007, which are the sections containing the challenged provisions as originally enacted. The full text of former sections 2006 and 2007 is set forth in Appendix H to the jurisdictional statement (J.S. App. A-38-A-42).

[3]See *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370, 372-373; *Shively v. Bowlby* (1894) 152 U.S. 1, 11, 14-15, 26, 57-58. The court of appeals erroneously attributed the State's title to the Submerged Lands Act (43 U.S.C. §§ 1301-1343). (J.S. App. A-2.) That act merely *confirmed* the State's sovereign title, and functioned as a *grant* only as to lands on the open coast, lying between the low-water mark and the three-mile limit, which lands this Court had previously held were subject to "paramount federal rights." (See *United States v. California* (1947) 332 U.S. 19, 38-39.)

beds of inland navigable lakes and rivers. (J.A. 108.) The Commission is empowered to issue ground leases regarding such property (Cal. Pub. Resources Code, §§ 6501-6509) upon "such terms and conditions as the commission deems to be for the best interests of the state" (*id.*, § 6501.2).

Pursuant to statutory authorization (*id.*, § 6108), the Commission has enacted regulations governing its leasing practices. (See J.S. App. A-29-A-37.) The regulations categorize ground leases by type (e.g., commercial, industrial, right-of-way) and authorize various modes of rent, including various forms of fixed annual rents and also variable rents, such as rents based on a percentage of gross income and (most recently) rents calculated by reference to the volume of commodities passing over the leased land (volumetric rent). (*Ibid.*; J.A. 108-110.)

The industrial lease classification includes ground leases for marine terminal sites. (J.A. 108.) All of the state leases referred to in the declarations filed with the district court in support of plaintiffs' renewed motion for summary judgment (J.A. 17) are marine terminal leases. (See, e.g., J.A. 35-51.) These leases cover sizeable areas of land, and confer exclusive berthing privileges as well as the right to place piers, wharves, and other substantial structures upon state land.[4] For payment of rental, the lessee is allowed to appropriate to its own exclusive use for a term of years discrete parcels of state-owned property. (J.A. 108-109.)

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[4]E.g., J.A. 35-40 (Union Oil Company lease); J.A. 59 (Standard Oil Company lease). Standard's Long Wharf marine terminal at Richmond is substantial enough to be shown on a large scale map of port facilities in the Bay Area. (See Donley, Atlas of California (1979) p. 103.)

The lower courts erroneously characterized the particular leases cited in plaintiffs' declarations as dealing with pipeline rights-of-way. (J.S. App. A-2, A-17-A-18.) Although volumetric rents apply to commercial and right-of-way leases as well, the leases before the court were all industrial leases for wharves and ship-berthing facilities. (See J.A. 19-106.)

The leases usually provide for two or three renewal periods, "upon such reasonable terms and conditions as the State . . . might impose" (e.g., J.A. 40), after which the lease expires. The original lease terms and the terms on renewal are negotiable. (J.A. 111-115.)

The Commission is not the sole owner of such marine terminal sites. As set forth in the appendix to this brief, over 60 cities, counties, and harbor districts hold state legislative grants of tide and submerged land, including, for instance, the Ports of Richmond, San Francisco, Oakland, Los Angeles, and Long Beach.[5] There are 418 miles of tidal shoreline and 305,381 acres (over 477 square miles) of tide and submerged lands owned and controlled by local entities. (Cal. State Lands Com., Granted Lands Summary (1977).) The City of Los Angeles, for instance, controls 26 miles of shoreline under such a grant, comprising 13,304 acres. (*Ibid.*)

Also, many thousands of acres of tide and submerged lands are in private ownership and are leasable for such purposes. Private tideland patents issued statewide by the state Surveyor-General total some 80,000 acres. (See Taylor, Patented Tidelands: A Naked Fee? (1972) 47 State Bar J. 420, 421.) In San Francisco Bay, over 14,000 acres of privately-owned tide and submerged land remain available for such uses. (See *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 526 [162 Cal.Rptr. 327, 606 P.2d 362].)

2. The Volumetric Rental Provision

In March 1975, the staff of the Commission recommended amending the Commission's leasing regulations to include an additional form of variable rent. (Administrative Rec-

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[5]The Appendix, *infra*, depicts the location of such grants in relation to existing Commission leases for marine terminal sites, and gives the statutory references for each such legislative grant.

ord (A.R.) 1-47.)[6] The proposal, which included a schedule of specific volumetric rates for various types of commodities, engendered considerable opposition from potential and existing Commission lessees. (E.g., J.A. 116-125, 151-158.) Following hearings and receipt of written comments, the Commission referred the matter to its staff for further review. (J.A. 116.) In April 1976, following further meetings with those affected and an extended inquiry into forms of ground lease rental being used in the rental market, the staff altered its proposal on volumetric rent in several particulars, responding to many of the criticisms made of the regulations as initially proposed. (J.A. 116-125, 279-281.) The principal change was to provide for case-by-case negotiation of volumetric rents; specific rates were deleted. (J.A. 117-118, 120-122.) The Commission adopted the revised proposal at its April 1976 meeting.

The volumetric rental alternative, in common with the various other rental formats in use by the Commission, is applicable alike to all varieties of land administered by the Commission, not just tide and submerged land, and it is applicable alike to all lessees, regardless of whether they are engaged in intrastate, interstate, or foreign commerce. (J.A. 110; J.S. App. A-29-A-37.) Volumetric rent is not applicable solely to leases involving petroleum or petroleum products; such rent is applicable to "commodities" generally. (*Ibid.*) In practice, volumetric leases have been executed involving such diverse commodities as coke (J.A. 93-95) and sand and gravel (J.A. 110).

The manner in which a volumetric rental provision works and the manner in which the various components of a volumetric rental formula are negotiated are set forth in detail

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[6]The administrative record was compiled before the Commission in connection with the adoption of the challenged regulations, and was lodged with the district court as an exhibit on January 5, 1981. (J.A. 1, 3.)

in one of the Commission's affidavits below. (See J.A. 111-115.) In summary, a minimum rent is derived by applying a yearly rate of return against a negotiated figure for the land's fee value, and that minimum rent is then applied against the rent accruing under the variable rent provision. (J.A. 111-112.) Also negotiable are the volumetric rate or rates and the volume levels at which different rates will apply. (J.A. 114; compare J.A. 25-34 (proposal) with J.A. 42-45 (negotiated terms).)

3. Volumetric Leases Generally

The results of the Commission staff's inquiry into volumetric ground leases, which led to the adoption of the revised regulation, are summarized in the staff report submitted to the Commission at its April 1976 meeting. (J.A. 116-125; see also J.A. 279-281.) In addition, substantial excerpts from the administrative record have been included in the joint appendix.

The principal criticism of volumetric rent at the hearings was that such a rent is used only in circumstances where the lessor provides services, facilities, and improvements for the use of the lessee. In response to this criticism, it was established that, where such improvements were provided, a part of the volumetric charge represented a variable return on the raw land. (J.A. 124-125.)

Numerous examples of volumetric rental charges for unimproved land were also developed, including gallonage rentals paid by service station lessees to the oil companies (J.A. 194, 348-349); rentals based on gallonage and a percentage of gross receipts for leases of marina sites where improvements are made and maintained by the lessee (J.A. 304-319, 334-337, 360-362); rentals for rights-of-way for the transportation of logs and coal based on the number of board-feet of logs or tons of coal passing over the road (J.A. 118-119); and franchise fees for the laying of pipe-

lines in city streets based upon a percentage of the per-barrel royalty generated by production of oil on a nearby production lease (J.A. 380-384).

Closest in point were the volumetric charges made by various ports for leases under which the lessee both constructed and maintained the improvements. (E.g., J.A. 245-246 (Pacific Gas & Electric Company pays to the Port of San Francisco 35 cents per ton of fuel oil put across wharf; PG&E built and maintains wharf and pipelines); J.A. 183-184 (Union Oil Company pays per barrel rental to Port San Luis for unimproved submerged lands; wharf built by Union); J.A. 368-379 (unimproved site used for oil and gas production, treating, storage and transportation center, together with pipeline easements running to and from site; rental paid by Texaco to private landowner based on percentage of per-barrel royalty paid by Texaco on offshore production lease); J.A. 289-303 (for privilege of laying pipelines on port property, Exxon pays Long Beach rent based on the barrels of oil put through pipelines constructed and maintained by Exxon).)

Concerning the volumetric "wharfage" charges made by ports for the use of their property (stated in cents per ton, cents per barrel, et cetera),[7] it was established that the ports figure the value of the raw land beneath wharves into their rate base for purposes of calculating a fair return in the form of wharfage and other port tariff charges (J.A. 408-409, 423-428, 445), and that such volumetric revenues exceed what is necessary to obtain a return on improvements alone (J.A. 124-125).

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[7]The Port of Long Beach tariff is set forth at pages 283 through 288 of the joint appendix. It is representative of the other tariffs included in the administrative record, and includes definitions of the various port charges and the land, improvements, services, or facilities to which they are applicable.

4. Proceedings Below

Shortly after adoption of the amendment, the plaintiff oil companies and their trade association, the Western Oil and Gas Association, filed suit in the district court, seeking a declaration that the regulation authorizing the negotiation of volumetric rent was invalid, and an injunction prohibiting the members of the Commission from demanding and collecting such rent. (J.A. 6, 15.) The complaint alleged that any such rental charges were *per se* invalid under the United States Constitution as "(a) an unlawful charge, duty or impost on imports; (b) an undue burden and unlawful charge upon interstate commerce; and (c) an unlawful duty on tonnage." (J.A. 10.)

The complaint also presented issues of state law, alleging that the regulation was contrary to a state leasing statute, and that the regulation was "unreasonable, arbitrary and capricious." (J.A. 14-15.) Following an abstention order by the district court, these state law issues were finally determined adversely to the plaintiff companies. The state courts concluded that in authorizing a volumetric mode of rent, the Commission had acted reasonably in light of the record before it. (J.A. 140-141; *Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 562, 564-565 [164 Cal.Rptr. 468], hg. denied by Cal. Supreme Ct. July 2, 1980.)

Upon return of the case to the district court, the parties filed cross-motions for summary judgment on the remaining federal constitutional issues. The question presented was the *per se* validity under the Constitution of the type of volumetric rent authorized by the Commission's regulation, regardless of amount.[8] The district court gave judg-

[8]At oral argument on the motions, plaintiff's counsel framed the issue as follows: "To us what this case is about is just the validity of a throughput charge *per se*, whether the State can charge even one-millionth of [a mill] as a throughput fee." (Reporter's Transcript, p. 12.) Neither in their pleadings nor in their moving papers did plaintiffs ask that particular volumetric rents that had been

ment for the plaintiffs. It rejected as inapposite the State's argument that volumetric rent was a commonly-used and reasonable form of rent and thus permissible under the Commerce Clause. (J.S. App. A-22.) The Court also denied any applicability of this Court's cases concerning exemption of the States from the Commerce Clause when they act as "market participants", concluding that "there is no analogous competitive marketplace involved in this case." (J.S. App. A-23.) Finally, it rejected the State's contention that neither the Import-Export Clause nor the Tonnage Clause was applicable to ground rents. (J.S. App. A-23-A-24.) The Court determined that a volumetric land rental, without the provision of additional services and facilities by the State, constituted the type of "trade barrier" that the Commerce, Import-Export, and Tonnage Clauses were "collectively" intended to prevent, and that such a rental "places a burden on interstate and foreign commerce that cannot be justified under the facts of this case." (J.S. App. A-24.)

The district court entered judgment enjoining the Commission "from assessing and collecting rent based upon the volume of commodities in interstate and foreign commerce passing over tidal and submerged lands in reliance upon California Administrative Code §§ 2005(b)(2) and 2005(b)(3)."[9] (J.S. App. A-24.)

On appeal, the court of appeals affirmed, concluding that the regulation authorizing the negotiation of volumetric rent was barred by the Commerce Clause and the Import-Export Clause. (J.S. App. A-13.) In reaching its conclusion under both constitutional provisions, the court relied on the decisions of this Court invalidating certain types of taxes. The court did not reach plaintiffs' Tonnage Clause contention.

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negotiated for specific leases be declared invalid, although there were references to alleged high rates of return on some leases.

[9]Currently Cal.Admin.Code, tit. 2, §§ 2003(a)(2) and 2003(a)(3). (See J.S. App. A-33-A-34.)

On the Commerce Clause issue, the court rejected the State's argument that the regulation authorized a reasonable form of rent, given the common use of this form of rent in the rental market generally. Instead, it concluded that the case was governed by Supreme Court cases concerning "user taxes", citing cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707. (J.S. App. A-8-A-9.) In so doing, it rejected the application of this Court's cases distinguishing taxes from rent charged for the private appropriation of particular parcels of public property. Applying the "user tax" cases, it concluded that volumetric rent for unimproved land necessarily yielded rentals "disproportionate to the benefits conferred by the State," that such rents were "not directed toward compensating the State for the use of the land" or the "wear and tear" from the use of the land, and that there was "no sufficient relation between the measure employed and the extent of the use of the state property." (J.S. App. A-8-A-9.) The court also rejected the State's additional contention that, as but one "market participant" in the negotiation of ground leases, both for upland property and tide and submerged lands, the Commission was not subject to the strictures of the Commerce Clause.

On the Import-Export Clause issue, the court adopted a similar rationale. Having determined that "there is no correlation between the volumetric rates and benefits conferred by the State," it concluded that the State "is 'levying . . . on citizens of other States by taxing goods merely flowing through their ports to the other states not situated as favorably geographically.'" (J.S. App. A-12-A-13.)[10]

[10]The court of appeals did not reach plaintiffs' assertion that volumetric rent is barred as well by the Tonnage Clause. Because the district court reached this additional contention, and decided it adversely to the Commission, the Tonnage Clause question is included among those presented by this case, in order that this Court may render a fully-dispositive decision.

SUMMARY OF ARGUMENT

The issue here is whether the United States Constitution completely forecloses use by the States and by local agencies (see *Guy v. Baltimore* (1879) 100 U.S. 434) of a form of ground lease rental that is commonly used in the rental market. The plaintiff oil companies claim that the question is indeed one of constitutional dimension and that the Constitution prohibits such a form of rent, at least when the State or a local agency is dealing with a lessee engaged in interstate or foreign commerce. They do not dispute, and in effect concede, that state and local governments may reasonably employ the challenged rental mode when dealing with persons engaged only in intrastate commerce. And they admit that private lessors are free to use such a form of rent regardless of the nature of the business conducted by their lessees.

1. A threshold question is whether the States, when negotiating ground leases for their property, are subject to greater strictures than are other lessors. Must the States offer independent justification for the rental modes that they choose to employ when entering the rental market?

a. This Court has recognized that States, when they act only as market participants, should be subject to no greater restraints than are private participants in the market. They should be free to choose with whom they will deal, and upon what terms. The doctrine applies here. The State Lands Commission is but one of many public and private land owners who control sites suitable for the loading and offloading of petroleum and petroleum products. Further, the application of the doctrine is uncomplicated here by the presence of any ulterior governmental goals. The State Lands Commission is participating in the market purely and simply to seek and obtain a fair rental for its land. Solely to obtain the advantage of a rental mode in common use by other lessors, it has amended its leasing regulations to allow the negotiation of volumetric rent.

Neither are there present here any of the side effects of the market participant doctrine that have caused concern in the course of its past applications. There is no discrimination against those engaged in interstate or foreign commerce; there is no effort to dictate or control the contractual relationships of other parties; and there is no evidence that such commerce has been or will be impeded in any way by use of this rental mode.

b. The rejection of the market participant doctrine by the court of appeals in this case rested solely on an indefensibly narrow definition of the "market" in which the State is participating. Ignoring the entirely consensual nature of the initial decision to enter into a ground lease, the court concluded that the State enjoyed a "monopoly" on a particular parcel of leased land when it came time to negotiate a revised rent upon renewal; that there accordingly were no other participants in the "market"; and that the doctrine therefore did not apply.

The time at which to define the market is prior to entry into the contract. After that point, there may be greater or lesser restraints on the freedom of both parties, depending on the terms of the contract, but that is as a result of the contract and actions taken in reliance on its terms, not the scope of the market. The Commission's leases do allow the substitution of new terms upon renewal, but only if they are reasonable. The doctrine was erroneously rejected by the court of appeals.

2. Even if the market participant doctrine does not apply, there is ample justification for the "reasonableness" of the rental form incorporated into the Commission's regulations.

a. In adopting the challenged regulation, the Commission looked to leasing practices in the ground lease market generally. The Commission was not an innovator in authorizing this form of rent. It has been widely used by other public and private lessors for both improved and unim-

proved property and regardless of the character of the commerce in which the lessees were engaged. The plaintiff oil companies are familiar with it, since they charge rent of their service station lessees on a gallonage basis. Several of them also pay volumetric rental to California ports for unimproved port land upon which they, not the ports, construct required improvements.

b. The court of appeals did not dispute the existence of these leasing practices. The court instead concluded, under the supposed compulsion of this Court's "user tax" cases, that the States were held to a different standard than were private lessors in choosing among available rental modes, and could only use rental modes that were aimed at defraying the State's out-of-pocket costs.

There is of course no form of ground rent—fixed or variable—that is limited to cost recovery alone. Further, there is no special constitutional legitimacy attached to fixed annual rents which derive from the land's fee value. Variable rents, including both percentage rents and volumetric rents, are keyed instead to the intensity of use of the leased land by the lessee, not the appraised fee value of the property.

3. This Court's tax cases, involving alleged duties on imports, alleged duties of tonnage, or alleged unreasonable burdens on interstate commerce, do not apply here and only serve to confuse matters, as is evident from the decision of the court of appeals. The type of charge authorized here is clearly rent, not a tax. If a reasonableness standard is to be applied to rental modes selected by state and local governments, specialized cases from the tax field do not provide it. Rather, reference should be had to commonly-accepted practice in the rental market for ground leases. Such practice clearly supports the reasonableness of the rental mode authorized by the Commission's regulation.

ARGUMENT

Reduced to its simplest terms, the argument of the oil companies is that the United States Constitution tells state lessors, alone among landlords, that they may use but one of the various ground lease rental formats in common use by other lessors when dealing with persons engaged in interstate or foreign commerce. The companies argue that only a flat annual rent, based on a percentage of fee value, is permissible. Volumetric rent (and presumably any variable rent, including percentage rent) is, *per se*, proscribed by the Constitution because it allegedly bears no relation to the value of what is leased. It is therefore not really rent, but rather a "tax" which is proscribed by the Commerce, Import-Export, and Tonnage Clauses. So the argument runs.

The court of appeals went even further. Its apparent conclusion, given its heavy reliance on "user tax" cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707, is that the States are limited to cost-recoupment in negotiating ground rents. The court referred to the "compensating" nature of such a charge, and stated that the "charge on [a] state-provided facility must be designed to defray its cost." (J.S. App. A-9.) If supportable, this would truly put the States in a class by themselves. There is no type of ground lease rental whereby the lessor limits his rent solely to what is necessary to recoup his out-of-pocket costs in connection with the lease.

Both the oil companies and the court of appeals ignore modern-day ground lease practice, in which the fee value of the leased land or the lessor's costs are not the sole reference points for an appropriate rent. As the use of variable rent demonstrates, intensity of use of the leasehold is also an appropriate yardstick for determining rent. The gallonage rent which these plaintiffs charge their own retailers (J.A. 194, 348-349) is a conspicuous example of a rent tied to intensity of use of the leased land.

It is therefore tempting to move immediately to a defense of the reasonableness of the volumetric rental mode, arguing that, because it is in common use by lessors and lessees generally, it therefore passes muster under the Commerce Clause. Indeed, the Commission has so defended its regulation throughout this litigation. There is a threshold question that should first be answered, however.

When negotiating the rental for a ground lease or when entering into any other type of contractual relationship, why should a State, any more than any other person, be required to independently justify the reasonableness of contractual terms consensually arrived at?

Accordingly, we first discuss the cases of this Court that relieve the States from any requirement of such an independent justification where the State acts as a market participant.

I. WHERE THE STATE IS BUT ONE PARTICIPANT AMONG MANY LESSORS, PUBLIC AND PRIVATE, IN THE MARKET FOR GROUND LEASES, NO ISSUE UNDER THE COMMERCE CLAUSE IS PRESENTED

A. The Rental Modes that a State Chooses to Use for Its Ground Leases Need Not Be Justified Under the Commerce Clause Where the State Is Acting As a Market Participant

The "market participant" exemption from application of Commerce Clause scrutiny to state action is articulated in the following cases: *Hughes v. Alexandria Scrap Corp.* (1976) 426 U.S. 794; *Reeves, Inc. v. Stake* (1980) 447 U.S. 429; *White v. Massachusetts Council of Constr. Employers* (1983) 460 U.S. 204; and *South-Central Timber Development, Inc. v. Wunnicke* (1984) ...... U.S. ......, 104 S.Ct. 2237. The cases hold that if a State is not regulating a market, but rather is participating in it, then as a matter of "evenhandedness" the State is subject to no greater restraints than are other market participants; it is similarly free to determine with whom it will contract, and on what terms.

(*White, supra,* 460 U.S. at pp. 208, 210; *Reeves, supra,* 447 U.S. at pp. 436-439, and fn. 12.)

The market participation by the State in this case fits comfortably within the confines of the doctrine. This is particularly so because there are not here present any ulterior "governmental" goals motivating the State's participation; it is merely seeking to obtain the fair rental rental value of its property, nothing more. This is therefore a "purer" market participation case than any of those that have preceded it. The market participation in *Hughes* was a means of achieving an environmental goal; that in *Reeves* a means of preserving for consumption by South Dakota citizens the cement produced by the State's cement plant; and that in *White* a means of enhancing the employment opportunities of Boston residents. Again in *South-Central,* where the Court found the doctrine inapplicable, Alaska's challenged contractual provision was motivated by the typically governmental motive of encouraging the domestic timber-processing industry. Particularly when such measures can be characterized as "protectionist" in nature, and clearly could not have been achieved through state taxation or regulation,[11] substantial tensions are created between the purposes of the Commerce Clause on the one hand and the desire on the other to allow the States the same freedom to contract enjoyed by private persons. No such background motive complicates application of the market participant doctrine in this case.

Neither are there present here any of the other factors that have caused concern in past applications of the doctrine. There is no discrimination against interstate or foreign commerce; the regulation applies as well to intrastate lessees. Mere passage by goods across the State's borders does not trigger any volumetric rent; only passage over

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[11]See dissenting opinion by Justice Powell in *Reeves, supra,* 447 U.S. at pp. 447-449.

discrete state ground leases does so. (See *Hughes, supra,* 426 U.S. at p. 803 ("state lines" cannot constitute trade barriers).) Neither is there any state effort to reach beyond the parties to the lease contract and regulate the contractual relationships of others who are not in privity.[12] And finally, there is absolutely no evidence in the record—and the companies made no effort to produce any—that use of volumetric ground lease rent by the Commission will reduce or impede by one iota the flow of goods in interstate or foreign commerce. Some such restricting impact—in some cases involving total prevention of the flow of goods or services—was present in each of the four cases in which the doctrine has been discussed, and was the object of concern, even though such interference is permitted where the doctrine is otherwise applicable.[13]

In summary, the regulation challenged here is aimed only at permitting the Commission to obtain, through negotiation, a type of rental that others are using. It is participating in the market, and subject to market forces. To deny the Commission use of this rental mode would, in some cases, require it to subsidize certain of its lessees. But "the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business."[14] Because the State is not compelled to lease its property in the first instance, lease terms can and should be left to negotiations between the parties. The alternative is to constitute the federal courts as rent review boards charged with making a series of ad hoc determinations of "reasonableness" con-

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[12]See dissenting opinion by Justice Blackmun in *White, supra,* 460 U.S. at pp. 216-223.

[13]See *Hughes, supra,* 426 U.S. at pp. 806 and fn. 15, 809 and fn. 18, 810; *Reeves, supra,* 447 U.S. at pp. 447-452 (Powell, J., dissenting); *White, supra,* 460 U.S. at pp. 223-224, fn. 7 (Blackmun, J., dissenting); *South-Central Timber, supra,* 104 S.Ct. at p. 2247.

[14]*Hughes, supra,* at pp. 815-816 (Stevens, J., concurring).

cerning this or that rental mode or rental amount. From the perspective of both the federal courts and the States, such a result is to be avoided. (See *Reeves, supra,* 447 U.S. at p. 438, fn. 10 (quoting with approval *American Yearbook Co. v. Askew* (M.D. Fla. 1972) 339 F.Supp. 719, 725).)

B. The Court of Appeals Mistakenly Rejected Application of the Market Participant Doctrine Based on Its Erroneous Conclusion that the State Enjoyed a "Monopoly"

The State has no monopoly on sites for the offloading or onloading of petroleum and petroleum products. That is evident from the numerous alternative sites owned both by private parties (see *ante,* p. 6) and by other public agencies (see map and listing of tide and submerged land grantees contained in the Appendix, *infra*). And it is clear that many of these competing sites are now handling substantial volumes of such commodities, particularly Long Beach and Los Angeles. (See Donley, Atlas of California (1979) p. 102.)

The court of appeals responded to this reality with a highly contrived and constricted definition of the relevant "market" in which the Commission was participating. Adverting to but one of the contexts in which volumetric rents may be negotiated (that of renewal of an existing lease), the court concluded that the State enjoyed a "monopoly" that rendered the market participant doctrine inapposite:

> "Although some of the lands are in the possession of local State entities or private interests, this does not mean that California becomes one of many competitors. The permanency of plaintiffs' facilities does not permit them to 'shop around'. There is no other competitor to which they can go for the rental of the required strip of California coastline. The Commission has a complete monopoly over the sites used by the oil companies. The companies have no choice but to renew their leases despite the volumetric rate, as the

oil, gas and petroleum-derived products cannot be transported to plaintiffs facilities without traversing the state-owned lands. This control over the channels of interstate commerce permits the State to erect substantial impediments to the free flow of commerce. We therefore reject the State's contention that its leasing activities are not subject to Commerce Clause scrutiny." (J.S. App. A-6.)

One might just as readily say that the lessor-owner of the downtown block upon which an office building sits enjoys a "monopoly" of office sites in the area when it comes time to consider renewal of an existing lease or the reissuance of an expired one. The lower court's error can best be understood by studying the various points in time at which a rental (volumetric or otherwise) may be negotiated.

First, there is the point at which no lease for a marine terminal exists. In this instance, the refinery, if one exists, is certainly not dependent on an adjacent marine terminal as the means of receiving and dispatching petroleum and petroleum products, for it never would have been built on the mere "hope" of the company later being able to strike a bargain with the owner of the terminal site. Such a preexisting refinery would most likely be serviced by an upland pipeline originating at either an inland location or a marine terminal located at a distance.[15] If, as is more likely, no refinery is in existence, and direct supply by oceangoing tanker is the preferable economic alternative, a refinery will be built only if a satisfactory lease can be negotiated with the owner of the adjacent tide and submerged land.

[15]There are numerous such upland pipelines in California, which bring oil to refineries either from inland locations or from terminals up or downcoast from the refinery. (See Donley, Atlas of California (1979) p. 87.)

A satisfactory lease would provide for a term of years sufficient to amortize not only the cost of the wharf to be built on the leased site, ***but also the cost of the adjacent refinery***, for there is always the possibility, upon the termination of the lease, that the lessor will not wish to reissue the lease or that the parties will be unable to come to terms. There certainly would be no obligation on the part of a private lessor to agree to reissuance of such a lease subsequent to its expiration, and a public lessor should enjoy like discretion.[16]

If the prospective lessee cannot negotiate a primary term of sufficient length to amortize his investment in both the refinery and wharf, he can seek to negotiate a renewal provision that, added to the primary term, will provide an adequate amortization period. If the prospective lessee cannot obtain such terms, he is free to walk away. But if he can obtain a renewal provision sufficiently protective of his long-term investment, he will enter the lease.

The Commission's leases routinely include such a provision. Two or more renewal terms, usually 10 years each in duration, are customarily provided for. (E.g., J.A. 40.) Although upon renewal the Commission may request alter-

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[16]A contrary conclusion—that the State as lessor is compelled in such circumstances to reissue the lease in perpetuity—would run afoul of California statutory and constitutional provisions, because it would constitute a de facto alienation of tide and submerged lands. Since 1909, the State has been prohibited by statute from selling tide and submerged lands. (Cal. Pub. Resources Code, § 7991 (Cal. Stats. 1909, ch. 444, § 1, p. 774).) Sales of tideland within two miles of an incorporated town or city are also prohibited by the California Constitution. (Cal.Const., art. X, § 3.) Further, the common law tidelands trust prohibits such alienation except in narrowly defined circumstances. (*City of Berkeley v. Superior Court* (1980), 26 Cal.3d 515, 521-525 [162 Cal. Rptr. 327, 606 P.2d 362].)

ation of the terms and conditions of the lease, including rent, it is confined to "reasonable" changes. (*Ibid.*) Such renewal terms are not unilaterally imposed, but rather are negotiated, just as are the initial lease terms. (J.A. 111-115.) If agreement on terms proves elusive, and the lessee feels that the Commission's terms are "unreasonable", he has his remedy in the form of an action for breach of contract.

To sum up, the only appropriate time to assess whether a monopoly exists is at that point when neither party is contractually bound to the other. At *that* point, are both parties free to contract or not as they choose or is one party constrained by circumstances to deal only with the other? Once the bargain is struck, the freedom of action of both parties is severely circumscribed, not by virtue of any monopoly that one has versus the other, but because they have mutually bound themselves to honor a contract and have acted in reliance on that contract.

Indeed, the argument of the court of appeals proves too much; for if the Commission has a "monopoly" upon lease renewal that triggers Commerce Clause scrutiny of the "reasonableness" of the proposed new rental, then *any* such lease renewal is subject to such scrutiny, including renewals where the Commission desires to change the rent, not to a volumetric mode, but to an increased dollar amount of fixed annual rent. We again have the specter of the federal courts functioning as arbitrators of every conceivable dispute over lease renewal terms where one party is a public agency and the other is engaged in interstate or foreign commerce.

The court of appeals concluded that the market participant exception did not apply only because it applied a strained definition of "monopoly" that was premised upon an unjustifiable characterization of the relevant market.

II. VOLUMETRIC RENT IS CONSTITUTIONALLY PERMISSIBLE

The court of appeals necessarily conceded that the State has a "right to the reasonable rental value of its property." (J.S. App. A-6, A-8.) It is established that interstate or foreign commerce is not entitled to a subsidy by the States; it "must pay its own way." (See *Ott v. Mississippi Barge Line* (1949) 336 U.S. 169, 174; *Western Live Stock v. Bureau of Revenue* (1938) 303 U.S. 250, 254.) A venerable line of precedent makes clear that a State may obtain compensation for services rendered or property provided, even though the cost of conducting interstate or foreign commerce is thereby increased. (E.g., *Cooley v. Board of Wardens* (1851) 53 U.S. (12 How.) 299, 315-320 (pilotage); *Atlantic & Pacific Tel. Co. v. Philadelphia* (1903) 190 U.S. 160, 162-163 (cost of supervising telegraph company's local operations); *Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 701-702 (wharfage); *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 97-98 (rent for space occupied by telegraph poles).) In the words of this Court:

> "Reasonable charges for the use of *property, either on water or land,* are not an interference with the freedom of transportation between the States secured under the commercial power of Congress. [Citations omitted.] That freedom implies exception from charges other than such as are imposed by way of compensation for the use of the *property employed,* or for facilities afforded for its use. . . . " (Emphasis added.) (*Gloucester Ferry Co. v. Pennsylvania* (1885) 114 U.S. 196, 217.)

The cases which suggest such a "reasonableness" limitation on charges made by a State for the use of its property do not quite fit the situation at hand. They involve situations where the charges were unilaterally imposed by government, rather than consensually arrived at, and pertained either to facilities that were in the nature of public utili-

ties or "affected with the public interest,"[17] or that involved public property that the private party had a right to use under a federal statute.[18] Neither situation obtains here. The Commission is here functioning simply as a landowner, and is not affirmatively providing services to the public generally. Nor is there any federal statute that entitles any group of prospective lessees to use state property, thereby implying some judicial monitoring of the compensation sought by the State.

The Commission is nonetheless willing to justify the reasonableness of a volumetric rental mode for ground leases, if for some reason the market participant exception to the Commerce Clause is determined to be inapplicable.[19]

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[17]See, e.g., *Transportation Co. v. Parkersburg, supra,* 107 U.S. at pp. 699-704, 706-707; *Ouachita Packet Co. v. Aiken* (1877) 121 U.S. 444, 447-450. In discussing reasonableness, these cases are discussing principles of the common law concerning restrictions on the charges of wharfingers (see, e.g., *Dutton v. Strong* (1861) 66 U.S. (1 Black) 23, 32-33), not a requirement imposed by the Constitution.

[18]There are numerous cases involving the "reasonableness" of charges unilaterally imposed by cities for the use of their streets for telegraph poles. (E.g., *St. Louis v. Western Union Telegraph Co., supra; Essex v. New England Tel. Co.* (1916) 239 U.S. 313.) It is apparent, however, that the "reasonableness" requirement regarding such charges stems from the companies' federal statutory entitlement to use of the streets. (See *Essex, supra,* 239 U.S. at p. 320.) Otherwise, a city could nullify the statutory guarantee of use by imposing exorbitant charges. Where such charges have been arrived at consensually, rather than unilaterally imposed by the city, the indication is that the federal courts will not look behind the agreement of the parties to assess reasonableness. (See *Postal Telegraph Cable Co. v. Newport* (1918) 247 U.S. 464, 471-474.)

[19]It can be argued that where there is no affirmative entitlement to use particular property, the "negative implications" of the Commerce Clause do not command public entities to make their property available for private use, even in a "monopoly" situation, provided the state or local government's motive for refusing to deal

A. Volumetric Rent Is Commonly Employed Regarding Unimproved Property by Other Lessors and Lessees, Including the Plaintiff Companies

It is fair to assess whether a particular ground lease rental mode is reasonable by examining what goes on in the rental market generally. This is what the Commission did here. The extensive administrative record compiled before the Commission during the hearings on the proposed amendment established that volumetric rental is commonly employed in ground leases (1) regarding all types of commodities, (2) as to both improved and unimproved land, (3) by both private and public lessors, and (4) regarding lessees engaged in interstate and foreign commerce as well as those engaged in intrastate commerce. With particular regard to the plaintiff oil companies, it was established that they and others are already paying such rent to local ports for leases of port property where they, and not the ports, have constructed the improvements. (J.A. 245-246, 183-184, 368-379.)

That the type of variable rent provided for in the Commission's regulations is an established element of ground leasing practice in California and elsewhere is quite obvious even apart from the administrative record. Such variable rentals are treated extensively in a practice book published by the California Continuing Education of the Bar. (Grenert, Ground Lease Practice (Cont.Ed.Bar 1971).) It is there explained that most long-term ground leases have two elements: (1) a minimum annual rent obtained by applying a capitalization rate to the appraised value of the land, and (2) a variable rental. (*Id.*, at § 1.40.) The Commission's volumetric leases have these same ele-

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is not antithetical to the goals of the Commerce Clause. (See *Oklahoma v. Kansas Nat. Gas Co.* (1911) 221 U.S. 229, 260-262 (State allowed the pipelines of intrastate transporters of natural gas to cross its highways, but denied interstate transporters that right, the purpose being to prevent interstate shipment of natural gas produced in Oklahoma).)

ments. The book discusses percentage of income as one means of setting a variable rental, and indicates that minimum rent is applied against the percentage rent. (*Id.*, at § 1.41, p. 40, §§ 2.12-2.14.) Again, this conforms to Commission percentage and volumetric lease practice.

Also pertinent is the following quote from the book:

> "A variation of the percentage-of-income provision is a *gallonage* provision common in service station leases (e.g., two cents per gallon of gasoline delivered by lessee to the premises). In some of these leases, the lessee is to pay the greatest of three figures: a fixed rent, a *gallonage* rate, and a stated percentage of gross sales." (Emphasis added.) (*Id.*, at § 1.41, p. 40.)

It is this same type of volumetric rent which the Commission has authorized as one of its alternative rental formats. It is ironic that the plaintiff oil companies, who have strenuously protested in this lawsuit that volumetric rent is "unreasonable" and "unrelated to a fair return", are themselves charging their own lessees volumetric rent.

Despite the evidence of the practice of lessors generally and of the ports in particular, plaintiffs press the argument that volumetric rentals are not appropriate for ground leases, but can be employed only where services, facilities, or improvements are provided by the lessor. But the fact that the Commission seeks such rent for "mere land" only suggests that the State's volumetric rents will tend to be less in amount, not that the mode itself is inappropriate. And in fact, the Commission's negotiated rates have been lower than those of the ports. (Compare the volumetric rates in the leases attached to plaintiffs' declarations (e.g., J.A. 42-45, 64-67) with the port wharfage rates set forth in the Horn Affidavit (J.A. 113-114) and the Long Beach tariff (J.A. 287).

There is no unique constitutional validity to the type of fixed annual rent that the oil companies argue is the Commission's sole option in entering ground leases for its property. Unimproved land has a rental value that can as easily be tied to the land's utility as to the market value of the fee. Variable rents focus on the land's utility, using its market value, if at all, only to derive a minimum rent. This is true of percentage rent as well as volumetric rent such as that collected by the oil companies themselves from their service station lessees. Such leases measure utility in terms of intensity of use, i.e., the volume of sales on the leased land (percentage leases) or the volume of commodities passing over the leased land (volumetric leases).

The court of appeals did not dispute the Commission's determination, upheld by the state court of appeal in the state proceedings (*ante*, p. 10), that there was a reasonable basis in accepted ground lease practice for authorizing use of the challenged form of rent. It nonetheless concluded that a rental form that could be employed regarding lessees engaged in intrastate commerce was constitutionally proscribed if the lessee was engaged in interstate or foreign commerce. This conclusion was not based on any determination that the regulation, on its face or in its application, discriminated against these plaintiffs or against interstate or foreign commerce.[20] Nor did the court point to any unto-

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[20]In fact, the Commission has employed the volumetric type of rent authorized by the regulation regarding lessees who are neither oil companies nor engaged in interstate or foreign commerce. (J.A. 110.) The decision of the court of appeals did, however, seem to be impliedly based on a perceived *potential* for abuse in the particular context of renegotiation of rent upon renewal of an existing lease for a marine terminal site adjacent to an existing refinery. (See J.S. App. A-6.) Apart from the fact that initial lease contracts can and do remove such potential (see *ante*, pp. 22-23), such a potential, even if it existed, would be no basis for invalidating a particular form of rent. If bargaining power is indeed unequal, *any* form of rent

ward fiscal burden that would be caused by such rent or to any reduction in the flow of petroleum or petroleum products. And it would be difficult to do so.[21]

The court seemed to base its decision on the supposed compulsion of this Court's decisions involving "user taxes."

B. In Negotiating Ground Lease Rental, the States Are Not Limited to Recovery of Their Out-Of-Pocket Costs

The reliance by the court of appeals on "user tax" cases such as *Evansville Airport v. Delta Airlines* (1972) 405 U.S. 707; *McCarroll v. Dixie Lines* (1940) 309 U.S. 176; and *Interstate Transit, Inc. v. Lindsey* (1930) 283 U.S. 183, was misplaced. Historically, it appears that "user taxes" were developed in response to early cases of this Court that prohibited "direct" application of general revenue taxes to those engaged in interstate commerce.[22] User taxes were accordingly fashioned to narrowly limit their revenue purpose to recouping state out-of-pocket costs incurred in providing services or facilities that directly benefitted interstate businesses. The cases concerning such taxes, which are unilaterally imposed for the transient nonexclusive use of public facilities, have no application to negotiated ground

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lends itself to "exaction" of exorbitant compensation by the lessor. Such a perceived potential is not a basis for denying to the State a form of rent that is in common use by others. The State stands ready to justify the reasonableness of rents renegotiated upon lease renewals, should such a challenge be made in future litigation.

[21]The regulation was enacted in 1976. Since that time, volumetric rentals exceeding the minimum rent have been placed in a special deposit account in the state treasury pending the outcome of this lawsuit. Twenty-six leases are represented in the account. The total of such impounded volumetric rentals as of July 1, 1984 is a relatively modest amount, $3,063,855, exclusive of accumulated interest.

[22]These formalistic distinctions in the tax field have since been abandoned by the Court. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609; *Complete Auto Transit v. Brady* (1977) 430 U.S. 274; *cf. Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276 (Import-Export Clause).)

leases whereby a lessee appropriates to his own exclusive use a discrete parcel of state property. In fact, this Court in *Evansville Airport, supra,* distinguished between the user tax on transient airport use there at issue and the rent paid by the shops, restaurants, parking concessions, and other "business" users of the airport. (405 U.S. at p. 718.)

Ground leases may employ a variety of rental modes, in none of which is the rent limited solely to what is necessary to recoup the lessor's out-of-pocket costs in providing and leasing the property. Rental under variable rent leases is not so limited, and neither is rental under the nonvariable fixed rent leases endorsed by the court of appeals here. Logically extended, the court's reasoning would mean that the State could recoup only its administrative costs as "rent", because the land that the Commission administers came into state ownership at no cost to the State. To the contrary, an appropriate rent is determined by the rental value of what is leased (computed in various alternative ways), and is not limited to recovery of the lessor's costs.

III. CASES CONCERNING TAXES, IMPOSTS, AND TONNAGE DUTIES HAVE NO APPLICATION TO CONTRACTUAL PAYMENTS FOR THE PRIVATE USE OF STATE-OWNED LAND

Below, the oil companies placed heavy reliance on the cases of this Court which measure various types of taxes against the constitutional limitations imposed by the Commerce, Import-Export, and Tonnage Clauses. If there is a standard of reasonableness to be applied in this case, it cannot be borrowed from such cases. The dangers of uncritically applying "reasonableness" standards from the tax field to state leasing practices have just been demonstrated.

The only basis for the rental mode in question is the State's status as a proprietor of land, not its general sovereign power to tax. We are dealing here with con-

sensual contractual relationships involving the leasing of real property, not with unilaterally-imposed levies by government that are independent of any proprietary touchstone.

The distinction between rent on the one hand, and taxes, imposts, and duties of tonnage on the other, is practical and real, and totally in keeping with the policies embodied in the Constitution. Rent is no less rent merely because its *measure* bears some similarity to certain types of taxes. For instance, a rent measured as a percentage of the leased property's value is not thereby rendered a "tax" merely because ad valorem property taxes are also measured in the same way. Neither is a rent measured by reference to a certain percentage of the gross receipts of the lessee's business on the leased property a "tax" because gross receipts taxes are calculated in the same way. And rent calculated with reference to units of a commodity coming across the leased property is not a "tax" merely because certain taxes may also be computed on a per-unit basis.

This Court has made it clear that charges for the use of public property may take various forms, including charges which, were they imposed as taxes, divorced from the conferral of specific property rights, would be prohibited by the Constitution.

In *St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, the company argued that a charge for placing its poles along the city streets was invalid as a tax on interstate commerce. This Court rejected the argument:

> "That this is not a tax upon the property of the corporation, or upon its business, or for the privilege of doing business, is thus disclosed by the very terms of the section. The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. *It is seeking to collect rent.*" (Emphasis added.) (148 U.S. at p. 98.)

And even in situations where such a charge for government-provided services or property was measured by vessel tonnage, the Court has validated the charge, citing the proprietary nature of the charge and rejecting arguments concerning "duties of tonnage". (*Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 695, 698, 699 (wharfage); *Packet Co. v. Keokuk* (1877) 95 U.S. 80, 87 (wharfage); *Cooley v. Board of Wardens* (1851) 53 U.S. (12 How.) 299, 313-314 (pilotage).) Both *Keokuk* and *Parkersburg* involved wharfage charges graduated by tonnage. The Court stated in *Keokuk*:

> "But a charge for services rendered *or for conveniences provided is in no sense a tax or a duty.* It is not a hindrance or impediment to free navigation. The prohibition to the State against the imposition of a duty of tonnage was designed to guard against local hindrances to trade and carriage by vessels, not to relieve them from liability to claims for assistance rendered and facilities furnished for trade and commerce. It is a tax or a duty that is prohibited: something imposed by virtue of *sovereignty,* not claimed in right of *proprietorship.* Wharfage is of the latter character. Providing a wharf to which vessels may make fast, or at which they may conveniently load or unload, is rendering them a service. . . . [A]nd, when compensation is demanded for the use of the wharf, the demand is an assertion, *not of sovereignty,* but of a right of *property.*" (Emphasis added.) (95 U.S. at pp. 84-85.)
>
> ". . . . Nothing in [*The Tonnage Cases*] justifies the assertion that either wharfage or port charges are duties of tonnage, merely because they are proportioned to the actual tonnage or cubical capacity of vessels." (95 U.S. at p. 87.)

And in *Parkersburg*:

"We think it very clear that the ordinance in question cannot be regarded as imposing any other charge than that of wharfage. The fact that the rates charged are graduated by the size or tonnage of the vessel is of no consequence in this connection. This does not make it a duty of tonnage in the sense of the Constitution and the acts of Congress. [Citations omitted.] . . . . [A duty of tonnage] has nothing to do with wharfage, which is a charge against a vessel for using or lying at a wharf or landing. The one is imposed by the government, the other by the owner of the wharf or landing. The one is a commercial *regulation*, dictated by the general policy of the country upon considerations having reference to its commerce or revenue; the other is a *rent* charged by the owner of the *property* for its temporary use. It is obvious that the mode of rating the charge in either case, whether according to the size or capacity of the vessel, *or otherwise,* has nothing to do with its essential nature."

(Emphasis added.) (107 U.S. at pp. 698-699.)

The land for wharves, piers, and other appurtenances which the State Lands Commission furnishes its lessees certainly provides the lessees with a necessary component of their operations—land—whether one chooses to term it a "convenience" (*Keokuk*), or just "property" (*Parkersburg*).

In addition to establishing the general point that this Court's tax cases are not helpful in resolving the issues at hand, these latter two cases of course dispose of the companies' argument that any rent negotiated under the rental mode here challenged would constitute a "duty of tonnage". Quite apart from the fact that such rents would not be computed with reference to the size or capacity of

the vessel,[23] they are clearly not imposed for the mere privilege of entering either the State or a port or harbor within the State; and it is only *such* charges, divorced from the provision of particular services or property, that are proscribed by the Tonnage Clause.[24]

By the same reasoning, the same conclusion follows regarding plaintiffs' theory that the challenged regulations provide for "duties" or "imposts" on imports and exports, and are thus proscribed by the Import-Export clause. Rent is not a tax. The volumetric charges are measured only by commodities that pass over discrete parcels of land leased from the State.

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[23]The duties prohibited by the Tonnage Clause relate solely to taxes on *vessels and like instrumentalities of commerce* for the mere privilege of entering a State; the clause has no relevance to goods or cargo. (*Huse v. Glover* (1886) 119 U.S. 543, 549-550; *Inman Steamship Co. v. Tinker* (1876) 94 U.S. 238, 243; *Transportation Co. v. Parkersburg* (1882) 107 U.S. 691, 698; *Scandinavian Airlines System, Inc. v. County of Los Angeles* (1961) 56 Cal.2d 11 [14 Cal.Rptr. 25, 363 P.2d 25] (a tonnage duty is imposed on the carrier as distinct from the cargo).) The proscription against duties of tonnage was intended to supplement, not duplicate, the constitutional proscription of the Import-Export Clause against duties on imported or exported goods. (See *Clyde Mallory Lines v. Alabama* (1935) 296 U.S. 261, 264-265; *Steamship Company v. Portwardens* (1867) 73 U.S. (6 Wall.) 31, 34-35.)

[24]*Ibid.*; compare *Cannon v. New Orleans* (1874) 87 U.S. (20 Wall.) 577, where the City of New Orleans passed an ordinance demanding "levee and wharfage dues" for steamboats that merely moored, landed, or stopped anywhere within the Port of New Orleans. There was no indication that the city furnished land, services, or other facilities with the exception of a single wharf. The charges were not limited to vessels using that wharf. The Court invalidated the charge as a duty of tonnage because it was imposed for the mere privilege of a vessel entering the port. The case has no application to a situation where a lessee obtains the right to appropriate a particular parcel of state land to its own commercial use.

Assuming that a reasonableness standard applies here to the Commission's alternative ground lease rental mode, then reasonableness should be determined with reference to the practice in the ground lease rental market regarding alternative means of measuring rental value and obtaining a return on one's land. Attempted application of reasonableness criteria from the specialized field of taxation of interstate and foreign commerce can only lead to anomalous results such as that reached here by the court of appeals.

CONCLUSION

The court of appeals erred in affirming the district court's blanket prohibition of volumetric rents, regardless of amount. There was no basis for invalidating the Commission's regulation, which merely authorizes the negotiation of such rental, and prescribes no rates.

The judgments below should be vacated and the case remanded to the district court for entry of an order denying the motion of plaintiff companies for summary judgment and granting that of the State Lands Commission.

Respectfully submitted,

John K. Van De Kamp
Attorney General of the
State of California
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

November 14, 1984

APPENDIX

Listed below are the California cities, counties, and harbor districts holding grants of tide and submerged land from the California Legislature, followed by a map showing the location of these grants in relation to leases for marine terminal sites issued by the California State Lands Commission.

Alameda (Stats. 1854, ch. 99; Stats. 1913, ch. 348; Stats. 1917, ch. 594; Stats. 1927, ch. 538; Stats. 1953, ch. 15.)

Albany (Stats. 1919, ch. 211; Stats. 1961, ch. 1763; Stats. 1977, ch. 1223.)

Antioch (Stats. 1955, ch. 1939; Stats. 1957, ch. 1430; Stats. 1963, ch. 1586.)

Arcata (Stats. 1913, ch. 344; Stats. 1917, ch. 542.)

Avalon (Stats. 1943, ch. 303; Stats. 1949, ch. 493; Stats. 1963, ch. 1884.)

Benicia (Stats. 1851, ch. 83; Stats. 1854, ch. 96; Stats. 1855, ch. 187; Stats. 1859, ch. 292; Stats. 1868, ch. 216; Stats. 1965, First Ex. Sess. 1964, ch. 18; Stats. 1965, ch. 2018; Stats. 1967, chs. 329, 1030.)

Berkeley (Stats. 1913, ch. 347; Stats. 1915, ch. 534; Stats. 1917, ch. 596; Stats. 1919, ch. 517; Stats. 1961, ch. 2180; Stats. 1963, First Ex. Sess. 1962, ch. 55.)

Bolinas Harbor District (Stats. 1957, ch. 800; Stats. 1961, ch. 1067; Stats. 1968, ch. 1285; Stats. 1969, ch. 787.)

Brisbane (Stats. 1982, ch. 995; Stats. 1983, ch. 1227.)

Capitola (Stats. 1935, ch. 687; Stats. 1974, ch. 884.)

Carlsbad (Stats. 1963, ch. 2064.)

Carpinteria (Stats. 1968, ch. 1044; Stats. 1971, ch. 1069; Stats. 1978, ch. 697.)

Chula Vista (Stats. 1925, ch. 120; Stats. 1947, ch. 184; Stats. 1953, ch. 593; Stats. 1959, ch. 706; Stats. 1961, ch. 328.)

Coronado (Stats. 1923, ch. 49; Stats. 1929, ch. 681; Stats. 1931, ch. 293; Stats. 1933, ch. 849; Stats. 1939, ch. 893; Stats. 1947, ch. 1563; Stats. 1949, ch. 1013; Stats. 1953, ch. 1839; Stats. 1957, ch. 836; Stats. 1963, First Ex. Sess. 1962, ch. 67.)

Crescent City (Stats. 1868, ch. 299; Stats. 1870, ch. 137; Stats. 1949, ch. 1085; Stats. 1963, ch. 977.)

Crescent City Harbor District (Stats. 1963, ch. 1510.)

Emeryville (Stats. 1919, ch. 515; Stats. 1959, ch. 921; Stats. 1968, ch. 415.)

Eureka (Stats. 1857, ch. 82; Stats. 1915, ch. 438; Stats. 1927, ch. 187; Stats. 1945, ch. 225; Stats. 1959, ch. 106; Stats. 1970, chs. 1085, 1086; Stats. 1971, chs. 1001, 1252; Stats. 1975, ch. 600; Stats. 1978, ch. 1095; Stats. 1982, ch. 1068.)

Hermosa Beach (Stats. 1919, ch. 479.)

Humboldt Bay Harbor, Recreation, & Conservation District (Stats. 1970, ch. 1283; Stats. 1971, ch. 1742; Stats. 1974, ch. 1191; Stats. 1975, ch. 587; Stats. 1976, ch. 1040.)

Imperial Beach (Stats. 1961, ch. 330.)

Laguna Beach (Stats. 1929, ch. 50.)

Long Beach (Stats. 1911, ch. 676; Stats. 1925, ch. 102; Stats. 1935, ch. 158; Stats. 1947, ch. 39; Stats. 1951, ch. 915; Stats. 1957, Ex. Sess. 1956, ch. 29; Stats. 1957, chs. 1151, 2000; Stats. 1959, chs. 1551, 1560; Stats. 1961, ch. 1579; Stats. 1963, chs. 1398, 1847; Stats. 1965, First Ex. Sess. 1964, ch. 138; Stats. 1965, ch. 1688; Stats. 1971, ch. 1252; Stats. 1975, ch. 600.)

Los Angeles (Stats. 1911, ch. 656; Stats. 1913, ch. 245; Stats. 1917, chs. 77, 115; Stats. 1921, ch. 768; Stats. 1929, ch.

651; Stats. 1945, ch. 1513; Stats. 1951, ch. 443; Stats. 1970, ch. 1046; Stats. 1979, ch. 926.)

Manhattan Beach (Stats. 1955, ch. 1427; Stats. 1963, ch. 1593.)

Marin County (Stats. 1897, ch. 81; Stats. 1959, ch. 497; Stats. 1965, First Ex. Sess. 1964, ch. 49; Stats. 1967, ch. 1391; Stats. 1969, chs. 787, 1375; Stats. 1974, ch. 813; Stats 1975, ch. 898.)

Martinez (Stats. 1976, ch. 815.)

Mill Valley (Stats. 1959, ch. 496.)

Monterey (Stats. 1868, ch. 210; Stats. 1903, ch. 237; Stats. 1919, ch. 669.)

Morro Bay (Stats. 1947, ch. 1076; Stats. 1955, ch. 413; Stats. 1957, ch. 1874; Stats. 1961, First Ex. Sess. 1960, ch. 70.)

Moss Landing Harbor District (Stats. 1947, ch. 1190; Stats. 1967, ch. 131.)

National City (Stats. 1917, ch. 28; Stats. 1923, ch. 46; Stats. 1925, ch. 50.)

Newport Beach (Stats. 1919, chs. 494, 495; Stats. 1925, ch. 121; Stats. 1953, ch. 1096; Stats. 1978, ch. 74.)

Noyo Harbor District (Stats. 1961, ch. 555.)

Oakland (Stats. 1852, ch. 107; Stats. 1854, ch. 73; Stats. 1862, ch. 294; Stats. 1874, ch. 113; Stats. 1909, ch. 390; Stats. 1911, chs. 654, 657; Stats. 1917, ch. 59; Stats. 1919, ch. 516; Stats. 1923, ch. 174; Stats. 1931, ch. 621; Stats. 1937, chs. 45, 96, 343, 908; Stats. 1939, chs. 143, 146, 147; Stats. 1941, ch. 720; Stats. 1943, ch. 607; Stats. 1945, ch. 218; Stats. 1953, ch. 658; Stats. 1955, ch. 1028; Stats. 1957, ch. 709; Stats. 1961, First Ex. Sess. 1960, ch. 15; Stats. 1961, ch. 931; Stats. 1965, ch. 1737; Stats. 1981, ch. 1016.)

Oceanside (Stats. 1979, ch. 846.)

Orange County (Stats. 1919, ch. 526; Stats. 1929, ch. 575; Stats. 1931, ch. 200; Stats. 1961, ch. 321; Stats. 1975, ch. 415.)

Palos Verdes (Stats. 1963, ch. 1975; Stats. 1968, ch. 316.)

Pittsburg (Stats. 1937, ch. 214; Stats. 1961, ch. 1835; Stats. 1963, ch. 1828.)

Port San Luis Harbor District (Stats. 1955, ch. 647; Stats. 1957, ch. 302.)

Redondo Beach (Stats. 1915, ch. 57; Stats. 1971, ch. 1555.)

Redwood City (Stats. 1945, ch. 1359; Stats. 1947, ch. 1394; Stats. 1955, First Ex. Sess. 1954, chs. 33, 34; Stats. 1961, ch. 2125; Stats. 1962, ch. 1658.)

Richmond (Stats. 1913, ch. 317; Stats. 1919, ch. 89; Stats. 1933, ch. 53; Stats. 1935, ch. 379; Stats. 1959, ch. 1336; Stats. 1971, ch. 233.)

Sacramento (Stats. 1868, ch. 519; Stats. 1970, ch. 1266; Stats. 1973, ch. 625.)

San Diego (Stats. 1911, ch. 700; Stats. 1913, ch. 77; Stats. 1915, ch. 676; Stats. 1943, chs. 70, 222; Stats. 1945, chs. 142, 222, 693; Stats. 1947, ch. 197; Stats. 1955, ch. 1455; Stats. 1961, ch. 479; Stats. 1963, chs. 2139, 2140; Stats. 1981, ch. 1008; Stats. 1982, ch. 482.)

San Diego Unified Port District (Stats. 1963, First Ex. Sess. 1962, ch. 67; Stats. 1963, ch. 673; Stats. 1965, chs. 349, 577, 1744; Stats. 1973, ch. 1114.)

San Francisco (Stats. 1851, ch. 41; Stats. 1853, chs. 24, 160; Stats. 1855, ch. 181; Stats. 1868, ch. 543; Stats. 1872, ch. 490; Stats. 1874, ch. 264; Stats. 1878, ch. 219; Stats 1903, ch. 265; Stats. 1923, ch. 88; Stats. 1927, ch. 784; Stats. 1931, chs. 627, 857, 1003; Stats. 1933, chs. 805, 912; Stats. 1935, ch. 437; Stats. 1937, ch. 368; Stats. 1943, ch. 987; Stats. 1947, chs. 434,

872; Stats. 1953, ch. 1252; Stats. 1959, First Ex. Sess. 1958, ch. 2; Stats. 1962, ch. 11; Stats. 1963, chs. 941, 1273, 1298; Stats. 1968, ch. 1333; Stats. 1969, chs. 1296, 1367, 1400, 1474; Stats. 1970, ch. 670; Stats. 1971, ch. 1253; Stats. 1975, chs. 422, 964; Stats. 1976, ch. 352; Stats. 1979, ch. 745.)

San Mateo (Stats. 1915, ch. 536; Stats. 1933, ch. 245; Stats. 1976, ch. 1099.)

San Mateo County (Stats. 1893, ch. 24; Stats. 1965, ch. 1857.)

San Mateo County Harbor District (Stats. 1961, First Ex. Sess. 1960, ch. 68.)

San Rafael (Stats. 1923, ch. 83; Stats. 1967, ch. 178; Stats. 1970, ch. 1383; Stats. 1971, ch. 1742.)

Santa Barbara (Stats. 1925, ch. 78; Stats. 1937, chs. 13, 365; Stats. 1941, 5th Ex. Sess. 1940, ch. 9; Stats. 1975, ch. 193.)

Santa Barbara County (Stats. 1931, ch. 846; Stats. 1968, ch. 1044.)

Santa Cruz (Stats. 1972, ch. 342; Stats. 1968, ch. 902; Stats. 1969, ch. 1291.)

Santa Cruz County (Stats. 1935, ch. 687; Stats. 1959, ch. 1938; Stats. 1968, ch. 902; Stats. 1974, ch. 884.)

Santa Cruz Port District (Stats. 1968, ch. 818.)

Santa Monica (Stats. 1917, ch. 78; Stats. 1949, ch. 616; Stats. 1970, ch. 1077.)

Sausalito (Stats. 1953, ch. 534; Stats. 1957, ch. 791.)

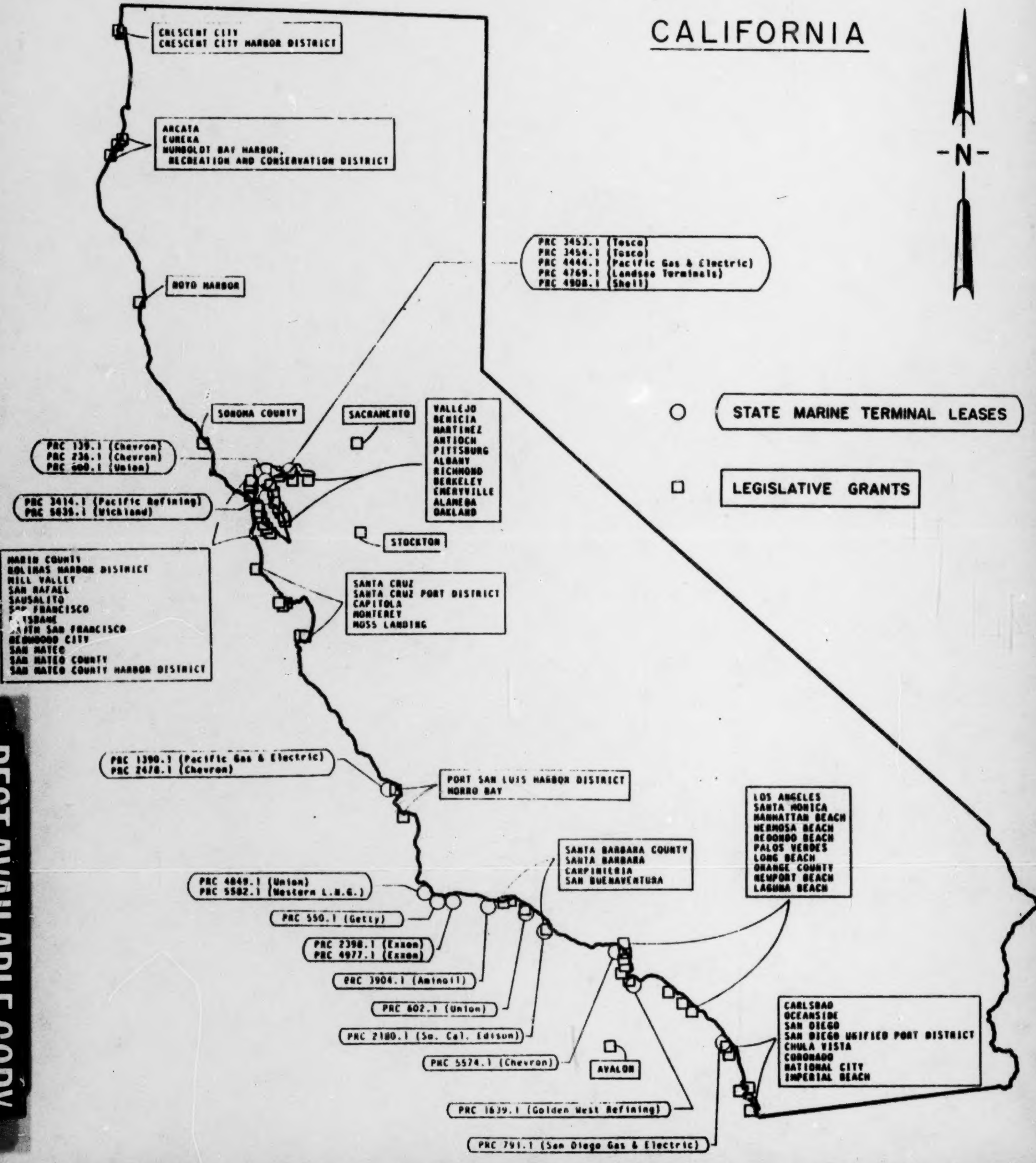
Sonoma County (Stats. 1943, ch. 218; Stats. 1951, ch. 1406; Stats. 1959, ch. 1064; Stats. 1961, ch. 799.)

South San Francisco (Stats. 1913, ch. 345; Stats. 1925, ch. 56.)

Stockton (Stats. 1965, ch. 1700.)

Vallejo (Stats. 1913, ch. 310; Stats. 1925, ch. 417; Stats. 1947, ch. 483; Stats. 1957, chs. 117, 1501; Stats. 1962, ch. 11; Stats. 1963, First Ex. Sess. 1962, ch. 63; Stats. 1963, ch. 24, Stats. 1980, ch. 895.)

Ventura (Stats. 1935, ch. 213.)



CALIFORNIA
-N-
STATE MARINE TERMINAL LEASES
LEGISLATIVE GRANTS
CRESCENT CITY
CRESCENT CITY HARBOR DISTRICT
ARCATA
EUREKA
HUMBOLDT BAY HARBOR, RECREATION AND CONSERVATION DISTRICT
NOYO HARBOR
SONOMA COUNTY
SACRAMENTO
VALLEJO
BENICIA
MARTINEZ
ANTIOCH
PITTSBURG
ALBANY
RICHMOND
BERKELEY
EMERYVILLE
ALAMEDA
OAKLAND
STOCKTON
PRC 3453.1 (Tosco)
PRC 3454.1 (Tosco)
PRC 4444.1 (Pacific Gas & Electric)
PRC 4769.1 (Landsea Terminals)
PRC 4908.1 (Shell)
PRC 139.1 (Chevron)
PRC 236.1 (Chevron)
PRC 600.1 (Union)
PRC 3414.1 (Pacific Refining)
PRC 5036.1 (Wickland)
MARIN COUNTY
BOLINAS HARBOR DISTRICT
MILL VALLEY
SAN RAFAEL
SAUSALITO
SAN FRANCISCO
BRISBANE
SOUTH SAN FRANCISCO
REDWOOD CITY
SAN MATEO
SAN MATEO COUNTY
SAN MATEO COUNTY HARBOR DISTRICT
SANTA CRUZ
SANTA CRUZ PORT DISTRICT
CAPITOLA
MONTEREY
MOSS LANDING
PRC 1390.1 (Pacific Gas & Electric)
PRC 2478.1 (Chevron)
PORT SAN LUIS HARBOR DISTRICT
MORRO BAY
SANTA BARBARA COUNTY
SANTA BARBARA
CARPINTERIA
SAN BUENAVENTURA
LOS ANGELES
SANTA MONICA
MANHATTAN BEACH
HERMOSA BEACH
REDONDO BEACH
PALOS VERDES
LONG BEACH
ORANGE COUNTY
NEWPORT BEACH
LAGUNA BEACH
PRC 4849.1 (Union)
PRC 5582.1 (Western L.N.G.)
PRC 550.1 (Getty)
PRC 2398.1 (Exxon)
PRC 4977.1 (Exxon)
PRC 3904.1 (Aminoil)
PRC 602.1 (Union)
PRC 2180.1 (So. Cal. Edison)
PRC 5574.1 (Chevron)
AVALON
PRC 1639.1 (Golden West Refining)
PRC 791.1 (San Diego Gas & Electric)
CARLSBAD
OCEANSIDE
SAN DIEGO
SAN DIEGO UNIFIED PORT DISTRICT
CHULA VISTA
CORONADO
NATIONAL CITY
IMPERIAL BEACH

(1)

No. 84-16

In the Supreme Court
OF THE
United States

KENNETH CORY, LEO T. MCCARTHY, and
JESSE R. HUFF, members of the
California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

**On Appeal from the United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX (Vol. I)

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney
General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

PHILIP K. VERLEGER
(Counsel of Record)
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 624-2400
Counsel for Appellees

Appeal docketed July 5, 1984
Probable jurisdiction noted October 1, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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*The amended memorandum and order and the amended judgment of the district court, as well as the opinion of the court of appeals, are printed in the appendix to the jurisdictional statement and have not been reprinted here. Also printed in the appendix to the jurisdictional statement and not reprinted here is the text of the challenged regulations as they read when initially amended in April, 1976 (J.S. App., pp. A-38-A-42) and as they now read (J.S. App., pp. A-29-A-37).

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RELEVANT DOCKET ENTRIES IN THE DISTRICT COURT

Western Oil & Gas Association, et al.,
Plaintiffs,

vs.

Kenneth Cory, et al.,
Defendants.

No. CIV. S-76-513 PCW

Date	NR.	Proceedings
Sept. 27, 1976	1	Complt. Iss summons.
Nov. 10, 1976	4	Notc & Mot/dismiss or stay of action. 12-20-76.
Dec. 10, 1976	8	Notc & Mot/S.J. or for Prelim. Injunct. 1-17-77.
Feb. 17, 1977		MIN ENTRY: Mot/S.J. or prlim Injunct Denied; (D) Mot/dismiss or stay action to be grntd upon receipt of (D) Ltr & Ord for sig or Crt.
May 18, 1977	18	Order—(P) Mot/S.J. Denied; (P) Mot/P.I. Denied; F.P. re action stayed.
May 20, 1977	19	JUDGT: Ent this date for defts. Approved as to form; notc 7 cpys mld.
Aug. 15, 1977	21	Stip re dismissal of action by (P) Edgington Oil Co. w/o prej.
Nov. 26, 1980	22	Pltfs notc/mot for renewed SJ—1/5/81 at 10 am
	23	Decln of J. Zaimes in suppt of motn
	24	Declns of: Cotrel; Palmer; Taafe; Waller & Swanson
Jan. 5, 1981	25	Deft not/motn for SJ—2/2/81 at 10 am
	26	Deft brf Lodged: Defts admin. record (in large box)
Jan. 19, 1981	28	Pltfs 2nd Memo suppt SJ Motn & oppos defts SJ motn

Date	NR.	Proceedings
Jan. 26, 1981	29	Defts reply brf suppt motn for SJ
Feb. 2, 1981		Min.: SJ motns submitted; ltrs to be filed by 2/9/81
Feb. 12, 1981	30	Defts ANSWER
Feb. 17, 1981	31	Pltfs ltr brf
July 29, 1981	32	Pltf's supp memo in suppt mot/SJ
Jan. 29, 1982	34	MEMORANDUM & ORDER: pltfs SJ motn granted; defts SJ motn denied; defts enjoined from assessing & collecting rent based on the volume of interstate & foreign commerce passing over tidal & submerged lands in reliance upon Cal. Admin. codes.
Feb. 1, 1982	35	JUDGMENT entered; notc mailed
Feb. 11, 1982	38	Defts notc/motn for recons.—3/22/82, 10 am
Mar. 8, 1982	39	Pltfs memo oppo defts motn for recons.
Mar. 15, 1982	40	Defts reply brf suppt recons. motn
Mar. 22, 1982		MINUTES: Defts recons. motn denied; deft prep ord
Mar. 30, 1982	41	ORDER: denying: defts motn to vacate; pltfs SJ motn; judgment be entered against plaintiffs & in favor of defts on pltfs 2nd claim on grounds of res judicata; specific modifications to be made in Memo & Ord & Judgment of 1/29; revised memo & Ord & judgment to be issued by Court.
Mar. 30, 1982	42	JUDGMENT entered 3/30/82; notc mailed
Apr. 15, 1982	44	AMENDED MEMORANDUM AND ORDER: pltfs SJ motn granted; defts motn for SJ granted as to pltfs 2nd claim & all other respects denied; defts enjoined from assessing/collecting rents
Apr. 16, 1982	45	JUDGMENT entered 4/16/82; notc mailed
May 11, 1982	46	Deft, State, NOTICE OF APPEAL; forms/ltrs sent
May 24, 1982	50	Deft/appellant's notc/motn suspend injunc. pending appeal—6/21

Date	NR.	Proceedings
June 7, 1982	53	Pltfs oppo to defts motn for suspension of injunc. pending appeal
June 14, 1982	55	Defts reply brf suppt motn for suspension of inj. pending appeal
June 22, 1982	57	Rptrs transc. hrgs. 2/2 & 3/22/81 Cert/ record mailed
July 7, 1982	59	ORDER: susp. injunction pending appeal
Aug. 18, 1982	61	Ltr brf of atty Eagan dated 2/6/81
Nov. 18, 1982		Record to 9th CA
Nov. 19, 1982		Mailed defts/appellants admin. record (lodged 1/5/81) to 9th CA as Exhibit to Clerk's Record mailed 11/18

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

Western Oil & Gas Association, et al.,
Plaintiffs-Appellees,

vs.

Kenneth Cory, et al.,
Defendants-Appellants.

No. 82-4261
D.C. No. CIV. S-76-513 PCW

Date	Filings-Proceedings
Aug. [—], 1982	Filed orig & 15 aplts' opening brief (43p), 5 excerpts of record in three volumes. (8/26) (3-day oral ext per JC) ag
Nov. 8, 1982	Filed as of Oct 29, orig & 15 aples' brief. (47 pgs) 10/26 -rmc-
Nov. 15, 1982	Filed orig & 15 aplts' reply brief (23p) (11/15) (oral ext per C*) ag
Dec. 1, 1982	FILED AS OF JUNE 23, CERT. TRANSC. OF RECORD ON APPEAL IN THREE VOLUMES: VOLS. I-II, PLEADINGS, CERT, COPIES ONLY, VOL. III, REPORTERS TRANSC. ORIG. ONLY. ONE BOX OF EXHIBITS FILED IN RM. 234. -rmc-
Jan. 11, 1983	ARGUED AND SUBMITTED BEFORE TANG, ALARCON, CJJ & TAYLOR, DJ (Idaho) -db-
Mar. 10, 1983	Recvd ltr from aplt dtd 3/9, re: addt'l cits. 3/9 (PANEL) EM
Mar. 21, 1983	Recvd ltr from aple (McCUTCHEN) dtd 3/17, re: addtl cits. (3/17) PANEL EM
Jan. 13, 1984	ORDERED OPINION (TANG) FILED AND JUDGMENT TO BE FILED AND ENTERED. EM
	FILED OPINION—AFFIRMED. JS/34
	FILED AND ENTERED JUDGMENT. EM

Date	Filings-Proceedings
Jan. 27, 1984	Filed aplt's Orig + 33 Petition for Rehearing with Suggestion for Rehearing En Banc. 1/26 (Panel & Active Judges) eal
Feb. 29, 1984	Filed Order (TANG, ALARCON, CJJ & TAYLOR, DJ) The opinion is hereby amended and the cite to Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) on page 202 of the slip opinion is deleted. eal
Apr. 6, 1984	Filed Order (TANG, ALARCON, CJJ & TAYLOR, DJ): The petition for rehearing is denied and the suggestion for rehearing is rejected. EM
Apr. 10, 1984	Filed aplt's notice of appeal to the Supreme Court of the United States. (4/10) tsp
Apr. 10, 1984	Filed aplt's motion to stay issuance of mandate pending disposition of appeal to the United States Supreme Court (4/10) (Tang) tsp
Apr. 20, 1984	Filed aple's statement of non-opposition for motion to stay the mandate (4/19) (Tang) tsp
May 18, 1984	Filed Order (TANG, ALARCON, CJJ, TAYLOR, DJ) It is hereby ordered that issuance of this Court's mandate is hereby stayed pending final disposition of aplts' appeal to the U.S. Supreme Court; provided, that this stay is expressly conditioned upon payment of all volumetric rentals negotiated during the pendency of the appeal in excess of the fixed minimum annual rent into a special interest-bearing account in the State treasury, said amounts to be refunded, with interest actually earned, to the respective lessees entitled thereto in the event of a final disposition of the appeal by the Supreme Court sustaining the judgment of this court on appeal. lw

United States District Court
Eastern District of California

No. CIV. S-76-513 PCW

Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California and Union Oil Company of California,
Plaintiffs,

vs.

Kenneth Cory, Mervyn M. Dymally and Roy M. Bell, individually and in their official capacities,
Defendants.

[Filed Sep. 27, 1976]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (CIVIL ACTION)

Plaintiffs Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Lion Oil Company, Shell Oil Company, Standard Oil Company of California and Union Oil Company of California allege as follows:

First Claim
(United States Constitution)

1. Jurisdiction over the First Claim herein arises under 28 U.S.C. § 1331 in that this is a claim arising under the Constitution of the United States; over the Second Claim herein pursuant to the principles of pendent jurisdiction; and, over the Third Claim herein under 28 U.S.C. § 2201. The amount in controversy under each claim herein is in excess of $10,000.00.

2. This case concerns the adoption by defendants Kenneth Cory, Mervyn M. Dymally and Roy M. Bell and the activities of the State Lands Commission of the State of California in imposing an unlawful system of charges for the leasing of State lands for wharves, piers, pipelines and other facilities on or under navigable waters of the United States within the State of California, to the injury of plaintiffs herein.

3. Plaintiff Western Oil and Gas Association ("WOGA") is a corporation organized under the California non-profit corporation law. Its principal place of business is Los Angeles, California. Plaintiffs Edgington Oil Company and Union Oil Company of California are corporations duly organized under the laws of the State of California. Plaintiffs Exxon Corporation, Getty Oil Company, Lion Oil Company, Pacific Refining Company, Standard Oil Company of California and Shell Oil Company are corporations duly organized under the laws of the State of Delaware. Plaintiff Atlantic Richfield Company is a corporation duly organized under the laws of the Commonwealth of Pennsylvania. All the foregoing companies are legally qualified to do and are doing business in the State of California.

4. The State Lands Commission ("SLC") is a commission created by the laws of the State of California. Defendant Kenneth Cory ("Cory") is Chairman of the SLC and defendants Cory, Mervyn M. Dymally ("Dymally") and Roy M. Bell ("Bell") are the Commissioners of the SLC. All defendants are being sued herein in their individual and official capacities. All are hereafter collectively referred to as SLC.

5. All defendants reside and maintain offices in the Eastern District of California and all claims asserted herein arose in that District.

6. The State of California, and its political subdivisions, hold, under grant from the United States under the Sub-

merged Lands Act (43 U.S.C. 1311 and 1312), title to tidelands and submerged lands beneath the navigable waters of the United States from the Mexican border on the south, to the border of the State of Oregon on the north, and from its coastline to a point three geographical miles out to sea. In addition, the State of California holds title to submerged lands, beneath streams and other navigable waters, within the State.

7. The SLC has authority by statute to administer and control State tidelands and submerged lands, beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits. It may lease such lands as provided by law. Before such a lease may be entered or renewed it must be authorized by the SLC.

8. California tide and submerged lands are used, *inter alia*, for wharves at which tankers are moored and similar facilities, and over which petroleum, petroleum products and other commodities are transported by pipeline and otherwise, and for mooring facilities placed offshore and connected by pipeline and hose with tankers. Petroleum, petroleum products, and other commodities in interstate and foreign commerce are transported by pipeline to and from said tankers and otherwise across such facilities. California tide and submerged lands are also used for pipelines to and from petroleum producing platforms in Federal areas beyond the three-mile limit, on the outer Continental Shelf, which pipelines traverse California tide and submerged lands and are used for the transportation of oil and gas in interstate commerce.

9. California's tide and submerged lands, including those held by political subdivisions, are so located that it is virtually impossible (a) to transport petroleum or other products by ship or barge to or from other states or foreign countries and into or out of California without traversing such lands; (b) to transport oil and gas or other

products by pipeline from the outer Continental Shelf to the landward portions of the State of California without traversing such lands; and, (c) to engage in intrastate commerce by ship or barge from one portion of the State to another without traversing such lands and without utilizing wharves upon said property.

10. The authority of the State over said lands is limited by the Constitution of the United States. Specifically, the State may not impose any of the following charges:

(a) Under Article I, Section 10, of the Constitution of the United States, the State may not impose, without the consent of Congress, any tax, duty, impost or other charge upon the importation of merchandise, including crude or refined petroleum, into the United States.

(b) Under Article I, Section 8, of the Constitution of the United States, California may not impose any undue burden upon foreign or interstate commerce.

(c) Under Article I, Section 10, of the Constitution of the United States, the State of California may not, without the consent of Congress, impose any duty of tonnage upon any vessel or cargo. A tonnage duty is a charge placed for the privilege of anchoring a vessel, or tying a vessel to a dock, or upon the value or amount of merchandise or commodities transported through, on or over California tide and submerged lands to the shore, if such charge is not based upon the value of facilities constructed by the state.

California has not received the requisite consent of Congress to impose any of the above type charges.

11. The State Lands Commission, acting through its members, the defendants herein, and in its capacity as administrator of California's tide and submerged lands has made such lands available for the construction of wharves

and similar facilities, and pipelines, for use as is set forth under paragraph 8 above. The State provides no facilities or services under such leases but merely provides unimproved land. At all times, to and including at least the 28th day of April, 1976, it was the practice of the SLC, pursuant to its regulations, to make said lands available by lease, and to collect a rental for such leases, based on a reasonable return on the appraised value of the land leased and the amount of land occupied by any pipeline.

12. Defendants, at the April 28, 1976, meeting of the SLC, amended the SLC's regulations to provide for the charging of "rentals" based not on the value of the land provided by the State but rather on the "volume of commodities passing over State land." Such a "rental" is known as a throughput charge. A true and complete copy of said amendments is attached hereto as Exhibit "A" and incorporated herein by this reference.

13. Pursuant to these regulations, defendants Cory, Dymally and Bell, acting as the State Lands Commission, have demanded, and continue to demand, as leases come up for renewal, are made for the first time, or as lessees seek consent for modifications or assignments of leases, that leases provide for "rentals" based not on the appraised value of the unimproved land leased but rather based on the volume of commodities passing over such lands.

14. Such throughput charges bear no relationship to the value of services rendered or benefits foregone by the State and their imposition will result in charges for the use of State lands that far exceed a rental based upon the reasonable rental value of that land. Such charges, being based on the amount of commodities in interstate or foreign commerce transported across California tide and submerged lands, constitute (a) an unlawful charge, duty or impost on imports; (b) an undue burden and unlawful charge upon interstate commerce; and, (c) an unlawful duty on tonnage.

15. (a) Plaintiff WOGA's membership includes oil companies carrying on in excess of 90% of the production, transportation, refining and marketing of crude petroleum in the Western United States and in California. Its members own and maintain crude petroleum, natural gas, and refined petroleum product pipelines located in the California tide and submerged lands which carry imported petroleum products and petroleum products in interstate commerce, and wharves, anchorages and similar facilities at which tankers are moored and over which various commodities pass, all as described above. It is not possible for said oil companies to transport said commodities into or out of California without utilizing said tide and submerged lands for the reason that, as aforesaid, said areas extend from the border of Mexico to the Oregon border. WOGA brings this action on behalf of its members for the reason, *inter alia*, that a comprehensive determination of the validity of the system established by defendants is essential. WOGA has been duly authorized to bring this action.

(a) Plaintiff Pacific Refining Company ("Pacific") is the owner of a refinery in Contra Costa County, California. Pacific acquired said refinery, formally owned by Sequoia Refining Corporation ("Sequoia") in 1976. Said refinery is served by facilities, at which vessels are moored and loaded and unloaded in interstate and foreign commerce, located on land under lease from the State of California. Said lease was originally issued to Sequoia and contained a clause forbidding assignment without the consent of the SLC. Defendants required Pacific to agree to a throughput charge based upon the amount of products going through said facilities as a condition to their consent to the assignment of the lease on said land. Pacific was compelled under protest to agree to such charges in order to be able to receive and ship cargoes without which it could not operate its refinery. Said charges cannot be precisely determined

but will probably exceed $75,000.00 per year, which amount far exceeds the reasonable rental value of the land under lease.

(c) Plaintiff Union Oil Company of California ("Union") holds leases administered by the State Lands Commission at various points in California, and will, in the ordinary course of business, continue to require such leases for importation of crude oil for use in its refineries, and for the transportation in interstate and foreign commerce of crude and refined petroleum. Union is currently discussing renewal of its lease for wharf facilities serving its San Francisco refinery. The State Lands Commission is demanding a rental under said lease based upon the amount of crude or refined petroleum crossing the leased areas. The charges being demanded will be imposed upon interstate and foreign commerce, including imports, and, while the exact amount thereof cannot be precisely determined, they will probably exceed $150,000.00 per year, which amount far exceeds the reasonable rental value of the land under lease.

(d) Plaintiff Lion Oil Company holds a lease administered by the SLC on which it has located wharf facilities used to transport coke and other commodities substantially all of which is in interstate and foreign commerce. In March of 1976 said lease was renewed for a 10-year period and amended to, among other things, fix an annual rental on said lease in the amount of $9,266.40. Said rental figure, as reflected in the Minutes of the SLC, was viewed by the SLC as the fair rental value of such property. Said renewal and amendment further provided, at the SLC's insistence, that the State could reset the rental on said lease at any time prior to February 28, 1977, to conform with any changes or additions to the SLC's rental regulations as might be promulgated. Pursuant to letter dated July 29, 1976, the SLC has demanded a throughput charge on said lease in the amount of five (5) cents per ton of any and all bulk commodities passing over the wharf. Said letter further de-

mands a minimum annual rental of $9,266.40. The effect of the throughput charge demanded by the SLC will, based on past experience, increase the rental on said lease in an amount two to three times that which the SLC has previously determined, only a few months prior to its July, 1976, letter, as the fair rental value on such property.

(e) Plaintiffs Atlantic Richfield Company, Edgington Oil Company, Exxon Corporation, Getty Oil Company, Shell Oil Company, and Standard Oil Company of California each hold leases from the State of California administered by the State Lands Commission. Said leases will come up for renewal at various times in the future, within the next few months to few years. As each of those leases matures, the State Lands Commission proposes to require a throughput charge which will apply to imports and to interstate and foreign commerce as to each of said leases. The amounts involved are many millions of dollars per year and will far exceed the reasonable rental value of such lands. In each instance, such facilities are essential to the operation of refineries, terminals and other basic parts of plaintiffs' businesses.

16. As a result of the implementation of these regulations, members of plaintiff WOGA, including the other plaintiffs herein, are being forced, and will continue to be forced, due to the virtual monopoly exercised by the State on the lands subject to such leases, to pay said unlawful charges to the State.

17. Plaintiffs have exhausted all their administrative remedies.

18. Plaintiffs have no plain, speedy and adequate remedy at law. The enforcement of this regulation, unless enjoined, will force WOGA members, including the other plaintiffs herein, to enter into leases containing unlawful throughput charges and to pay unlawful charges in the amounts of millions of dollars per year, no part of which may ever be recovered.

Second Claim
(Pendent Jurisdiction)

19. Plaintiffs incorporate herein by reference paragraphs 1 through 18, inclusive, of the First Claim herein.

20. Those wishing to lease lands owned by the State must apply to the SLC for such a lease. Upon receipt of such an application to lease State lands the SLC is directed by § 6503 of the California Public Resources Code to "appraise the lands and fix the annual rental or other consideration therefor . . . ." Under this section the rental to be charged for any particular lease must be based on the appraised value of the land leased.

21. Under the law of the State of California the SLC, in adopting regulations, is required not to act in an unreasonable, arbitrary, capricious or discriminatory manner.

22. The above-referenced regulations, in allowing for rentals on a throughput basis, are in excess of the authority of the SLC, and the other defendants herein, and are invalid under the laws of the State of California for the following reasons:

(a) Pursuant to such regulations the "rental" to be charged for the use of State lands is based not on the appraised value of that land, as required by Public Resources Code § 6503, but rather on the volume of commodities passing over such land, which volume is in no way related to the value of such land, *i.e.*, neither the value of the land nor the burden imposed on the land is in any way changed by reason of differences in the volume of commodities passing over such lands via pipeline or otherwise; and,

(b) They are unreasonable, arbitrary and capricious in that (1) they represent an effort by the SLC to extract exorbitantly high charges for the use of State lands, as compared to the value of that land, by trading on the virtual monopoly position occupied by the State over such lands,

and (2) they allow for discriminatory and unequal treatment of lessees in that rentals charged on leases of substantially identical amounts of land in the same general location will be allowed to vary greatly depending on factors, *i.e.*, the volume of commodities passing over such lands, which are in no way related to the value of that land or to services rendered by the State.

Third Claim
(Declaratory Relief)

23. Plaintiffs incorporate herein by reference paragraphs 1 through 18 of the First Claim and paragraphs 20 through 22 of the Second Claim.

24. An actual controversy has arisen and now exists between plaintiffs and defendants concerning the validity of the SLC's throughput rental regulations. Defendants assert that such regulations are valid and lawful and plaintiffs assert them to be invalid and unlawful. Plaintiffs are entitled to a judicial declaration regarding the validity of these regulations.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid;

2. For a preliminary and permanent injunction against defendants', and each of them, enforcement of such regulations, Exhibit "A" hereto, and specifically prohibiting their demanding and collecting rentals pursuant to such regulations;

3. For costs of suit herein; and,

4. For such other relief as the Court deems appropriate.

Dated: September 23, 1976.

Ingoglia, Marskey & Kearney

McCutchen, Black, Verleger & Shea
Philip K. Verleger
David A. Destino
Donna R. Black

/s/ David A. Destino
Attorneys for Plaintiffs

[Exhibit "A" omitted in printing. For text of regulations as originally amended, see J.S. App. H, p. A-38. For current text of regulations, see J.S. App. G, p. A-29.]

United States District Court
Eastern District of California

[Title omitted in printing]

[Filed Nov. 26, 1980]

NOTICE OF MOTION AND MOTION FOR RENEWED SUMMARY JUDGMENT

To Defendants and to Their Attorneys of Record:

Please Take Notice that on Monday, January 5, 1981 at 10 a.m., in Courtroom 2, plaintiffs will renew their motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is made on the grounds that certain regulations adopted by the State Lands Commission, codified in 2 California Administrative Code § 2005, violate the Federal Constitutional provisions against imposing imposts or duties on imports or exports (Constitution, Article 1, § 10, Clause 2); that the regulations violate the Commerce Clause (Article 1, § 8, Clause 3); and, that the regulations violate the Federal Constitutional prohibition against assessing a Duty of Tonnage (Article 1, § 10, Clause 3).

Plaintiffs filed a Motion for Summary Judgment before this court on December 10, 1976. Defendants moved for a Stay of Action Under the Doctrine of Abstention. After briefing and argument, the court signed an order dated May 17, 1977, staying further proceedings in this action:

> "... under the doctrine of abstention until a subsequent action to be filed by plaintiffs in the State court determines the issues of State law presented in this action and becomes final."

A copy of the court's Order is attached as Exhibit A to the Declaration of John P. Zaimes, filed herewith.

As stated in the Zaimes Declaration, WOGA filed an action in the Superior Court, entitled *Western Oil and Gas Assn. v. California State Lands Comm.*, Sup. Ct. No. 267822, 3 Civ. 18577 on appeal. The trial court entered a judgment against WOGA on cross-motions for summary judgment. The Court of Appeal for the Third Appellate District affirmed the judgment by opinion dated May 8, 1930, 105 Cal. App. 3d 554. The California Supreme Court denied a Petition for Hearing by order dated July 2, 1980. A copy of the California Supreme Court's Order is attached to the Zaimes Declaration as Exhibit B. Thus, the summary judgment motion is properly before this court.

This motion is supported by the Memorandum of Points and Authorities and declarations filed herewith and by the entire file herein.

Dated: November 21, 1980

Respectfully submitted,

McCutchen, Black, Verleger & Shea
Philip K. Verleger
Betty-Jane Kirwan
John P. Zaimes

By /s/ Betty-Jane Kirwan
Attorneys for Defendants
Western Oil and Gas Association

[Proof of service by mail omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF WILBUR H. COTREL IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Wilbur H. Cotrel, declare:

1. I am the same Wilbur H. Cotrel who filed an affidavit in this proceeding, dated November 19, 1976, a copy of which is attached hereto as Exhibit 1. I am the Manager of Property Services in the Union Real Estate Division of Union Oil Company of California ("Union"), and have responsibility for the supervision and administration of rights of way and leases for various operating facilities of the Company, including certain of its leases from the State of California.

2. Union presently owns and operates a wharf and pipelines located on tide and submerged lands in Contra Costa County owned by the State of California, which tide and submerged lands are leased from the State Lands Commission ("SLC") under a lease designated as Lease No. P.R.C. 600.1. True copies of this lease and subsequent amendments and renewals to it are attached in Exhibit 2 as follows:

Exhibit 2(A)—Lease commencing April 6, 1951.

Exhibit 2(B)—Amendment to Lease dated August 29, 1951.

Exhibit 2(C)—Amendment to Lease No. P.R.C. 600.1 dated April 6, 1954.

Exhibit 2(D)—Modification to Lease No. P.R.C. 600.1 dated March 24, 1960.

Exhibit 2(E)—Lease Renewal and Amendment to P.R.C. 600.1 dated October 22, 1971.

Exhibit 2(F)—Renewal and Amendment to Lease P.R.C. 600.1 dated August 8, 1978.

3. The land leased from the State of California is totally undeveloped tide and submerged land. The State of California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Union. In order to make this unimproved land usable, Union invested approximately $5,200,000 to construct a wharf and pipelines. In order to continue to use these improvements, Union must, at its own expense, maintain the facilities and dredge the submerged lands. As one example, Union spent approximately $292,000 in 1978 for dredging alone.

4. Union made these substantial investments on the land leased from the state and continues to properly maintain these improvements at great expense to enable Union to transport crude oil and refined product to and from its refinery. The Union refinery is located on approximately 1,112 acres of land owned by Union in fee and adjacent to the state's land. Union has invested in excess of $219,000,000 in the refinery. To operate the refinery, Union must cross the leased lands: there is no other means available to Union to transfer crude oil and commodities between the refinery and tankers moored at sea.

5. From 1951 until the adoption of the volumetric rental regulations in 1976, the practice of the SLC was to collect a rental from Union based on a reasonable rate of return on the appraised value of the leased land. Union's lease, Lease No. P.R.C. 600.1, provided that all renewals would be on "reasonable" terms, which Union believes to be the fair market rate of return on the appraised value of the leased land.

6. The last prior renewal of Lease No. P.R.C. 600.1 expired on April 5, 1976. Union made an application for a

10-year extension of the lease on November 6, 1975. The SLC proposed its terms for renewal in a letter dated June 29, 1976. (A copy of that letter is attached as Exhibit A to my previous affidavit, Exhibit 1 hereto.) This letter announces the SLC's intention to insist on the imposition of a volumetric rental. Union renewed its lease on this basis solely because of the tremendous investment that it had made on the land leased from the state on the adjacent land owned by Union.

7. Under the renewed lease the rent to be paid is calculated as follows. First, the SLC appraised the value of the land to be leased and calculated an 8% return on the appraised value. This amount, formerly the maximum rent, became the minimum annual rent in the amount of $41,000 per year for the first five years, and $50,000 per year for the remaining five years.

8. In addition, the SLC applied a per barrel rent based on the total throughput of commodities passing across the leased land. During the first four lease years under the renewed lease (April 1, 1976 through March 31, 1980), this per barrel rent has resulted in an average annual charge, over and above the minimum annual rent, of approximately $49,000. Based on the State's appraised value of the leased parcels, this has given the SLC an average annual net rate of return of approximately 18% during the aforementioned four lease years. Based on present projections of total throughput of commodities passing across the leased land during the remaining six years under the renewed lease, the annual charge over the minimum rent will be approximately $53,000 during the current lease year and $67,000 during each of the remaining five lease years. This will result in an annual net rate of return for the SLC of 18% for the current lease year and 23% for each of the remaining five lease years.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined product that crosses the state's land is subject to this charge. All of said crude imports come from places outside the State of California. Currently, approximately 49% of the finished and unfinished refined petroleum products leaving said refinery are destined for places outside of California.

I know the above from my own personal knowledge and could competently testify thereto.

Dated at Los Angeles, California, this 7th day of November, 1980.

/s/Wilbur H. Cotrel

Exhibit 1

Affidavit of Wilbur H. Cotrel

County of Los Angeles
State of California

Wilbur H. Cotrel, being first duly sworn, deposes and says:

1. I am Manager Property Services, in the Union Real Estate Division of Union Oil Company of California, a corporation ("Union"), and have responsibility for the supervision and administration of rights of way and leases for various operating facilities of the Company, including certain of its leases from the State of California.

2. Union is presently lessee under a lease entered between it and the State Lands Commission ("SLC"), designated by the SLC as lease number P.R.C. 600.1, covering state tide and submerged lands located in Contra Costa County. Said lease was originally entered in 1951, and has been renewed periodically since that date. The past practice of the SLC in fixing rentals on said lease has been to fix the amount of rent as a percentage of the appraised value of the state land.

3. The last renewal on lease number P.R.C. 600.1 expired on April 5, 1976. Application for a ten-year extension of the lease (as permitted under its provisions) was made on November 6, 1975. It was not, however, until Union received a letter from the SLC dated June 29, 1976, that the SLC proposed its terms for renewal. A copy of that letter is attached hereto as Exhibit "A".

4. Pursuant to Exhibit "A", the State has proposed a rental ranging between one-half cent and one cent per barrel of products passing over state lands, with a minimum rental in the amount of $52,640.00 per year.

5. At Union's request, the SLC has provided it with a letter explaining how it arrived at the figures set forth in Exhibit "A". By letter dated October 13, 1976, Union was informed that the $52,640.00 figure represents what the state views as an eight percent return on what it found to be the appraised value of the land. A copy of that letter is attached as Exhibit "B". That letter goes on to indicate how the SLC computed the throughput charges.

6. I know the above from my own personal knowledge and could competently testify thereto.

/s/ Wilbur H. Cotrel

Subscribed and sworn to before me
this 19th day of November, 1976.

Theresa M. Thomas

[Seal]

Exhibit A

[Letterhead]

State of California—State Lands Commission
State Lands Division
1807 13th Street,
Sacramento, California 95814
(916) 445-7738

June 29, 1976
File Ref.: WP 600

Union Oil Company of California
Union Oil Center, Box 7600
Los Angeles, CA 90051

Attention: W. H. Cotrel, Manager,
Property Services

Gentlemen:

As you know, the Commission, at its meeting on April 28, 1976, adopted changes to its general leasing regulations; which changes provide for a rental alternative based on the volume of commodities passing over State land. Accordingly, as partial consideration for amending and renewing lease P.R.C. 600.1, we propose to charge a rental which embodies the Commission's newly-adopted leasing regulations. Staff has valued the site and would be willing to recommend a rental schedule as follows:

Rental, based on the number of barrels (42 U.S. gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter (July 5, October 5, January 5, April 5) of the lease year (April 6 through April 5) and shall be paid as follows:

$0.01 per barrel until the minimum rental is equaled. (See below for minimum annual rental.)

$0.0050 per barrel for the next 15 mmbls.

$0.0075 per barrel for each barrel thereafter.

The minimum annual rental shall be $52,640, and shall be paid in advance by Lessee on or before April 6th of each lease year.

In arriving at the above annual rental figures, staff conducted an investigation into the relative value of site occupied by the wharf and appurtenant structures. Consideration was also given to those criteria outlined in the Commission's regulations (§ 2006 (h), 2 Cal. Adm. Code, Article 2). Primarily, an attempt was made to relate the utility and value of the State's land to those unimproved water-covered areas in various ports and harbors in California.

In arriving at a value for the State's land, consideration was given to the various methods of valuing water-covered port lands. This included examination of existing port tariff schedules, analysis of port leases and preferential berth assignment agreements, interviews with knowledgeable port personnel, including in each instance, the designated port property manager. Consideration was also given to site peculiarities, adjacent land values and other comparable or related data.

In addition to the change in rental, appropriate changes to the lease will be made to provide for the periodic payment of the volumetric rental, and provisions for reporting and auditing of statements by Division staff will be added.

It is our belief that the volumetric rental proposed herein provides a fair and reasonable return to the State for use of the public's land. We would be pleased to discuss with you any questions you may have on the proposed volumetric rental charges.

Very truly yours,

/s/G. R. Horn
Land Agent

Exhibit B

[Letterhead]

State of California--State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814
(916) 445-7738

October 13, 1976
File Ref.: WP 600

Union Oil Company of California
Union Oil Center, Box 7600
Los Angeles, CA 90051
Attention: W. H. Cotrel, Manager
Property Services

Gentlemen:

Proposed Volumetric Rental—Oleum Wharf Site

Below, I will attempt to relate to you the methodology used in setting the rental that was proposed to you in my June 29th letter. Included will be a breakdown in the areas and values used in computing the minimum annual rental, and the concepts and rationale behind the volumetric rental.

Below is a breakdown of the lease area:

Lease Parcels:

Parcel 1 (filled tidelands) 3.68 ac. at $.60 sq. ft. . .	
Parcel 2	7.401
Parcel 3	4.088
Parcel 4	0.712
Parcel 5	0.690
	12.891

Ac. at $1.00 sq. ft.

Note: Parcel 6 (Intake line) not included in this appraisal.

Therefore:	3.68 ac. at $.60 rounded	96,000
	12.891 ac. at $1.00 rounded	562,000
		658,000
	Rent at 8% x 658,000	$ 52,640

Basis for Valuation:

Parcel 1: Value $26,000 per acre or $0.60 per square foot.

Filled tidelands adjacent to deep-water channel; value based on regional industrial land sales—adjusted for the particular characteristics of this site. Conventional appraisal procedures were used to arrive at this value, supplemented by analysis of existing State Lands leases.

Parcels 2 through 5: Value $43,560 per acre or $1.00 per square foot.

These are submerged lands on a deep-water channel fully capable of supporting international water-borne commerce. The method of valuation used was to compare the State submerged lands with existing port facilities of the Bay area—specifically that of the Port of Richmond. We (and the Attorney General's appraisal consultant) believe that the leased parcels (2 through 5) supply Union with a "wet water" use comparable to that of a port. Without use of the State's land, a prospective lessee would have to arrange a facility in the closest port.

The appraiser examined Port of Richmond leases and discussed the value of wet berthing areas with the Port Director. Based on this information, a value somewhat less than $1.00 per square foot was assigned to the State's land in a benchmark appraisal. The appraiser examined the leases and the "preferential berth assignment" agreements of the various ports and found that the lease rights granted are similar to what the State grants its lessees.

The State leases property rights to Union to construct and maintain a pier with necessary appurtenant pipelines, for the loading/unloading of bulk petroleum products. These rights are let for relatively long periods of time (up to 49 years).

The consultant (with our concurrence) believes the best comparability for the lease area (State lands) lies in the similarity in utility provided by the ports in their leases and preferential berth assignments for the loading and unloading of merchandise. Accordingly, since the appraiser found a rent value of "wet lands" in Ports ranging from \$.92 to \$1.00 (including the Port of Richmond—nearest comparable) he assigned a value of nearly \$1.00 per square foot for the State's land. We have used this unit value in arriving at the total value for parcels 2 through 5. I am attaching a list of some of the agreements the appraisal consultant and Division staff appraisers have examined in the various ports in both northern and southern California. Additional information concerning these agreements may be obtained by examination of file working papers on the agreements, discussion of the agreement provisions with knowledgeable port officials (generally the port property manager), and obtaining from the port accounting office a listing of actual rents paid per the wharfage schedule.

Some of these agreements will not show a breakdown between dry (filled) land and water-covered lands, therefore, it becomes a question of how to allocate the value between the dry and wet lands. If one were to follow the May, 1974 Main Lafrentz & Co. study for the California Association of Port Authorities (updated version of the Freas report on valuation of Port Lands and derivation of wharfage charges), the value to water-covered port land is calculated as follows: Using conventional appraisal techniques, the adjacent dry port lands are valued. The water-covered area is then added to the total dry land area; the value of the dry land area is then ascribed to the total area (dry and water-covered lands). When you apply this approach to the lease agreements of the ports, the results will show that generally the water-covered lands will have a unit value considerably greater than the \$1.00 per square foot we have discussed.

In addition, both the Port of Los Angeles and Port of Long Beach have, in their latest published tariff schedules, a schedule of rents for the occupation of various port properties. The schedule shows that rent for the occupation of water-covered areas (for vessels accorded free dockage) shall be one cent per square foot per month. Depending on the capitalization rate used to translate the rate into value, the unit value can range between $52,000+ per acre ($1.20 per square foot) and $65,000+ per acre ($1.50 per square foot). This schedule of rents appears to more than support our position (and that of the ports) that raw water-covered lands are at least worth $1.00 per square foot.

In arriving at the volumetric rental proposed in my June 29th letter to you, we gave consideration to those criteria set forth in the Commission's new volumetric regulations. We also considered similar agreements, i.e. City of Seal Beach agreement with Exxon; Hollister Estate agreement with Texaco and of course, existing port tariffs. These data show that other entities have charged (both directly and indirectly) on a commodity basis ranging from several mils to as much as 3.5 cents per barrel for passage of petroleum products over land. Our proposed schedule of volumetric rental falls well within this range.

Part of the rationale behind the rental schedule, as proposed, is to encourage the efficient use of the public's land by limiting their use to the minimum amount necessary. This is accomplished by charging a high initial volumetric rate until the minimum annual rent is equaled. If a lessee is occupying a large amount of State land, some of which is not being used to its highest and best use or most intense use, the lessee will be penalized by paying the higher volumetric rate for a longer period of time until the higher minimum rental is equaled. Once the minimum annual rental is equaled, the volumetric rental is reduced substantially to encourage continued high productive use of the lands.

The later rise in the volumetric rental schedule reflects the intense use of the land and the increased probability of a spill or other incident that may degrade the State's land.

We believe that this approach is sound and is not dissimilar to the method of collecting rental (wharfage) by the ports. Our experience has been that the ports enjoy an "overage" after a return "of" and return "on" their investment in the port facilities. In some cases, after the minimum rental in a port has been equaled, the wharfage rate is reduced by some given factor; however, in other instances, we have found that once the minimum annual rental is equaled the wharfage rate continues at the stated amount and often the actual payment to the port is many times the stated annual rent. A good example of this is the lease between Texaco, Inc. and the Port of Long Beach. It is our belief that a substantial portion, if not all, of this "overage" is a return to the land since the port has already obtained a return "of" and "on" its cost to construct the improvements. Accordingly, we feel that volumetric rental represents a truer measure of the relative value of the State's land which is equal or nearly equal in utility (in some cases the State's land will have greater utility—deep water 70+ feet depth MLLW) to the water-covered areas in a port.

We should be pleased to assist you in any way we can in your review of the principles we have applied in the determination of rent for the Oleum Wharf site. And, to reiterate, the volumetric rental proposed in my previous letter was not meant to be an ultimatum. It was, and still is, our opinion of a reasonable, fair rental for the subject site based on existing comparable or related data and consistent with rental practices used by other prudent land owners. However, we would be pleased to discuss with you any information you have or may generate which is germane to this discussion.

It is hoped that we can negotiate an agreed rental based on a mutual exchange of pertinent data.

Please contact me if you have any questions on this matter.

Sincerely,
/s/ G. R. HORN
G. R. HORN
Land Agent

GRN:ds
Attachments

Agreements Examined by A. G. Valuation Consultant and Division Staff Appraisers in Determining Rents for Wharf and Marine Terminal Sites

Port of Los Angeles
- Union Oil Company
- Shell Oil Company
- Standard Oil Company
- Mobil Oil Company
- Phillips Petroleum Company
- Edgington Petroleum Company
- General American Transportation Corporation (GATX)
- Japan Line (U.S.A.) Ltd., et al.
- University of So. Calif.

Port of Richmond
- Pacific Vegetable Oil Corporation
- Canal Industrial Park, Inc.
- Pacific Molasses Co.
- Dorword & Sons Co.
- Petromark—Terminal 1
- Pasha Truckaway—Shipyard
- Levin Metals—Shipyard
- Willamette Iron and Steel—Shipyard

Port of San Francisco
- Bethlehem Steel
- Pacific Far East Lines
- State Steamship
- P.G. & E. Co.

Port of Oakland
- Western Pacific
- Merritt Ship Repair
- Pacific Dry Dock
- Kaiser Steel
- Matson Terminals
- Schnitzer Steel Products

Port of Long Beach

Texaco, Inc.

ARCO

Others currently under investigation

Port of San Diego

San Diego Gas and Electric

Others currently under investigation

In addition to the above data, other sources of information investigated were those situations involving a volumetric charge listed in the staff report on volumetric rental rates presented to the Commission on April 28, 1976 (copy attached).

Exhibit 2A

State of California
State Lands Commission
State Building
Los Angeles
54354.1

No. 600 Public Resources Code Series
5/15/51

For such consideration and specific purposes as are hereinafter set forth, and subject to such terms, conditions, reservations, restrictions and time limitations as are hereinafter set forth:

The State of California, Party of the first part, hereinafter called the State, acting through the State Lands Commission and pursuant to the authority contained in Division 6 of the Public Resources Code and the rules and regulations adopted thereunder, does hereby demise and lease for a term of fifteen (15) years, beginning April 6, 1951 to Union Oil Company of California of the County of Los Angeles, State of California, and hereinafter called the Lessee, a lease of, in, and upon those certain tide and submerged lands situate in the County of Contra Costa, State of California and more particularly described as follows, to wit:

[Property description omitted in printing]

The parties of this agreement do hereby covenant and agree as follows:

1. That the term of this agreement shall commence upon the above recited date of April 6, 1951 and shall continue thereafter (unless sooner terminated as hereinafter provided) until April 5, 1966;

2. That the Lessee shall pay to the State as consideration for the granting of this agreement, a rental sum which

shall be payable in accordance with the following schedule: (See photostat copy for correct figures)

One thousand nine hundred fifty six and seventy four one-hundredths (1956.74) dollars on April 6, 1951, being the first and last years rental under terms of this agreement less five hundred fifty two and no one hundredths (552.00) dollars credit for the unexpired nine months period under terms of lease No. 84, Public Resources Code Series terminated on April 5, 1951, and one thousand two hundred four and thirty seven one-hundredths (1204.37) dollars on April 6, 1952 and on like date of each succeeding year that this agreement remains in force; provided, however, that in the event of termination of this agreement under the provisions of paragraph 15 herein no portion of any rental, paid in advance shall be refundable.

3. That the Lessee will pay to the State the said rental consideration reserved to the State, in accordance with the schedule contained herein, to the State Lands Commission, Room 301 California State Building, 217 West First Street, Los Angeles 12, California, without deduction, default or delay; and, in the event of failure of the Lessee so to do, or in the event of a breach of any of the other covenants contained within this agreement, or failure to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for the State to re-enter into and upon the demised premises, and to remove all persons and property therefrom, and to re-possess and enjoy the herein described demised premises as in the first and former estate of the State, anything to the contrary herein contained notwithstanding;

4. That the described land shall be used during the terms hereof only for lawful commercial purposes, the maintenance and operation of a filled area and wharf for purposes incident to the operation of the Lessees refinery adjacent thereto.

5. That construction of facilities to be installed on the described land shall be started not later than .... and completed not later than ....;

6. That the Lessee shall not transfer nor assign this agreement and shall not sublet said land nor any part thereof, except upon the prior written consent of the State first had and obtained;

7. That the State expressly reserves the right to grant easement or crossings, in, upon and under the demised premises, and nothing herein contained shall be construed as limiting the powers of the State to lease, convey, or otherwise transfer or encumber, during the life of this agreement, the hereinbefore described State lands for any purpose whatsoever not inconsistent or incompatible with the rights or privileges granted to the Lessee by this agreement;

8. That the Lessee shall maintain and keep in good sound repair, all structures, facilities or appurtenances upon the property and that no substantial alterations to existing structures or creation of new structures or removal of any structure shall be undertaken without the prior written permission of the State first had and obtained;

9. That the Lessee shall be liable for and agrees to indemnify the State against any loss, damage, claim, demand or action, caused by, arising out of, or connected with the construction or maintenance of structures upon, or the use by the Lessee and/or agents thereof, of the demised premises;

10. That the Lessee shall observe and comply with all rules and regulations now promulgated by any agency of the State of California having jurisdiction therein and such reasonable rules and regulations as may hereafter be promulgated by any agency of the State of California having jurisdiction therein; and the Lessee shall at all

times take suitable precautions to prevent pollution and contamination of waters of San Pablo Bay;

11. That the State, through its authorized agents, shall have the right at all reasonable times to go upon the demised premises for the purpose of inspecting the same;

12. That there is reserved to the State all natural resources, timber and minerals, including oil or gas in or upon the described land and the right to grant in, over and across said land, leases, easements and/or rights-of-way to extract or remove such natural resources, timber or minerals as provided by law and the rules and regulations of the State Lands Commission and without compensation to the Lessee;

13. That the Lessee shall file with the State and maintain in full force and effect at all times during the term of this lease or any extension thereof, and the additional period of ninety (90) days referred to in Paragraph 14 hereof, a good and sufficient surety bond drawn in favor of the State of California in the penal sum of thirty five thousand (35,000) dollars, to guarantee to the State the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in Paragraphs 4 to 17, inclusive, of this agreement, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee;

14. That the following specifically enumerated and described structures, buildings, pipe lines, machinery and facilities placed or erected by Lessee or existing and located upon said demised premises shall become and remain the property of the State upon expiration or earlier termination of this agreement:

all fill heretofore or hereafter placed on Parcel No. 1 described in this agreement.

All other structures, buildings, pipe lines, machinery and facilities placed or erected by Lessee or existing and lo-

cated upon said demised premises shall be salvaged and removed by Lessee, at Lessee's sole expense and risk, within ninety (90) days after the expiration of the period of this agreement or prior to any sooner termination of this agreement; and Lessee in so doing shall restore said demised premises as nearly as possible to the condition existing prior to the erection or placing of the structures, buildings, pipe lines, machinery and facilities so removed;

15. That the Lessee may terminate this agreement upon sixty (60) days notice of such termination to the State; provided, however, that no such termination shall become effective, and the Lessee shall be fully liable for rent and for the performance of all other obligations on the part of the Lessee, until said Lessee has fully complied with and has consummated each and all of the provisions of Paragraphs 14 and 16 hereof;

16. That the Lessee will, on the last day of said term or sooner termination of this agreement, peaceably and quietly leave, surrender and yield up to the State, all and singular, the demised premises in good order, condition and repair, reasonable use and wear thereof and damage by act of God or the elements excepted; and execute and deliver to State a good and sufficient quitclaim deed to the rights arising hereunder. Should Lessee fail or refuse to deliver to the State a quitclaim deed as aforesaid, a written notice by the State reciting the failure or refusal of the Lessee to execute and deliver said quitclaim deed as herein provided shall from the date of recordation of said notice be conclusive evidence against Lessee and all persons claiming under Lessee of the termination of this agreement;

17. That all notices herein provided to be given shall be deemed to have been fully given when made in writing and deposited in the United States mail, registered and postage prepaid, addressed as follows:

To the State:
State Lands Commission,
Room 301,
California State Building,
217 West First Street,
Los Angeles 12, California.

To the Lessee:
Union Oil Company of California
Union Oil Building
Los Angeles 17, California

The address to which the notices shall be mailed as aforesaid may be changed by written notice as herein provided; but nothing herein contained shall preclude the giving of any such notice by personal service;

18. That time is the essence of each and all the terms and provisions of this agreement, and the terms and provisions of this agreement shall extend to and be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto; if more than one Lessee is named herein the obligations of said parties herein contained shall be joint and several;

19. This agreement may be terminated or the provisions changed, altered or amended by mutual consent of the parties;

20. That the Lessee or the heirs and assigns of, or any successor in interests thereto, shall have the right to renew this agreement for two additional periods of ten (10) years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose.

IN WITNESS WHEREOF, The parties hereto have caused this agreement to be executed this 15 day of May, 1951.

[Subscriptions omitted in printing]

Exhibit 2F

State of California
State Lands Commission

Renewal and Amendment of Lease PRC 600.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor, and Union Oil Company of California, as Lessee, made and entered into a Lease Agreement, designated lease PRC 600.1, covering certain filled and unfilled tidelands and submerged lands situate in Contra Costa County, which lease was issued May 15, 1951 by the State for a period of fifteen years commencing April 6, 1951; and

Whereas, said lease was amended by instrument dated August 29, 1951; and

Whereas, said Lease was amended by instrument dated April 6, 1954; and

Whereas, said Lease altered by instrument dated March 24, 1960; and

Whereas, said Lease was renewed and amended by instrument dated October 22, 1971; which renewal and amendment relates back to April 6, 1966; and

Whereas, by terms of said Lease PRC 600.1, Paragraph 20, Lessee was granted the right of renewal for two additional periods of ten years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose; and

Whereas, Lessee had previously exercised its right of renewal for the first period of ten years and has now formally exercised its last remaining right of renewal of Lease PRC 600.1 for a period of ten years, upon the terms and conditions as hereinafter provided;

Now therefore, it is agreed by and between the parties hereto as follows:

1. Lease PRC 600.1 is hereby renewed for a period of ten (10) years beginning April 1, 1976 and ending March 31, 1986.

2. *Amendment of Description of Demised Premises.* The land description presently contained in Lease PRC 600.1 as subsequently amended is hereby deleted in its entirety and there is substituted therefor that description shown as Exhibit "A" dated February 5, 1976, and revised March 31, 1978, attached hereto and by reference made a part hereof.

3. *Annual Rental:* Effective April 1, 1976, Paragraph 2 and 3 of original Lease PRC 600.1 and subsequent recitals of annual rental amounts are deleted and the following substituted therefor:

"2. Monetary Consideration: Commencing on April 1, 1976, and continuing through March 31, 1981, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U.S. Gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter of the lease year and shall be paid on or before the last day of the following month as follows:

(a) Until the minimum annual rental provided for in subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the

State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 7,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and thereafter $0.006 (6 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) *Minimum Annual Rental:* The minimum annual rental for each lease year shall be $41,000 and shall be due and payable on or before the first day of such lease year; provided, however, that the minimum annual rental for the lease years commencing April 1, 1976, April 1, 1977 and April 1, 1978 shall be due and payable (without interest) upon execution and delivery of this Renewal and Amendment of Lease PRC 600.1 and Lessee shall be allowed as a credit thereto the sum of $41,040.00 heretofore paid on account thereof. In each lease year the minimum annual rental shall be applied against the annual rental computed in 3(a) and 3(b) above.

(d) Rental shall not be imposed for passage of a commodity over the State's land if rental has already accrued on that identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are *not* identical to crude oil include, but are not limited to: fuel oils, diesel oils, gasoline, petrochem-

icals, kerosenes, jet fuels, naptha and other middle distillates.

(e) Rental based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall *not* accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands.

(f) Lessee shall, with each quarterly rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor, signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the demised premises. Lessee shall maintain for audit of such statements and shall furnish on thirty days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets and other pertinent documents, sufficient to determine the nature, quantity, origin/destination and ownership of commodities so received or shipped. Such source documents shall be maintained for a period of at least five years after their preparation.

(g) The annual rental provided for herein shall be paid to Lessor without deduction, delay or offset, at such place as may be designated by Lessor, and at the times specified herein. In the event of the termination of the Lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

4. *Annual Rental for Second Five Years of Extended Term.* For the period beginning April 1, 1981 and ending March 31, 1986 (herein called the "Second Five-Year Period"), annual rental shall be paid as follows:

(a) Until the minimum annual rental provided for in paragraph 4(c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the

number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 10,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof: and thereafter $0.005 (5 mils) per barrel for next 20,000,000 barrels of such commodities passing over the State's land in that same lease year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) Minimum annual rental "Second Five-Year Period": The minimum annual rental for each lease year beginning April 1, 1981 shall be $50,000 and shall be due and payable on or before the first day of such lease year. In each lease year the minimum annual rental shall be applied against the annual rental computed in 4(a) and 4(b) above.

5. *Holding Over and Late Payments.*

(a) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of this lease renewal agreed to herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive rentals, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be con-

strued as a limitation upon any other remedy which the State may have against a hold over Lessee.

(b) It is agreed by the parties hereto that any rentals accruing under the provisions of this renewal and amendment that shall not be paid when due shall bear interest from the date when the same was payable by the terms hereof at the rate specified in Public Resource Code Section 6224, until the same shall be paid by the Lessee.

(c) The failure to pay rentals when due shall also subject the Lessee to penalty of ten (10) percent of each delinquent rental payment.

(d) It is agreed by the parties hereto that the interest and penalty provisions referenced in (a), (b) and (c) above shall not apply to volumetric rental due and for the lease years beginning April 1, 1976 and April 1, 1977.

6. Lessor reserves the right to periodically inspect the leased land and improvements located thereon to insure that Lessee's improvements comply with applicable State and Federal regulations.

7. Paragraphs 9 and 13 of said Lease PRC 600.1 as amended, are hereby deleted and the following substituted therefor:

"9. Indemnity, Bond and Insurance:

(a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California, its officers, agents and employees against any and all claims, demands, loss, action or liability of any kind which State of California, or any of its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them arising out of or connected with the issuance of this amended lease, including, without in any way limiting the generality

of the foregoing, any claim, demand, loss, or liability arising from any failure of title or any alleged violations of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease renewal, and an additional period of one hundred twenty (120) days or until the State has accepted a quitclaim deed and sufficient evidence of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of Fifty Thousand Dollars ($50,000.00), to guarantee to Lessor the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in this amended lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his expense and keep in full force and effect during the term of this lease, for the protection of Lessee and the State in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and the surrounding area with limits of not less than $1,000,000 for bodily injury and $5,000,000 for property damage. The policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that liability insurance coverage herein provided for shall be in effect at all times during the term of this lease, and until said leased land is restored as nearly as possible to the condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept

the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased lands as then improved, Lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the condition existing prior to the erection and placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the term of this amended lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than one (1) year, and until the leased land is restored as nearly as possible to the condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the State Lands Commission, and Lessee agrees that no construction, improvements, additions, work or services shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insurance coverage as herein provided, State may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

9. *Oil Spill Emergency.* In the event of a spill or leak of oil or other liquid pollutants into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services via the toll-free 24-hour service telephone number 1-800-852-7550. For spills of 10 barrels or more, Lessee shall report directly to the State Lands Commission 24-hour service telephone

number (213) 590-5201. Information to be reported shall include, but not be limited to:

> The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the water body affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and the action taken.

10. *Marine Terminal/Wharf Operations.* Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State regulations and guidelines covering Lessee's operations on and about the demised premises. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

11. *Repossession.* In the event of failure of Lessee to pay rental, or in the event of a breach of any of the other covenants contained within the lease, as herein amended, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom and to repossess and enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period and to diligently pursue to conclusion the actions necessary to cure such default, and, so long as such default is cured within such prescribed time limits, Lessor shall not repossess the demised premises as provided herein.

12. *Possessory Interest.* Lessee recognizes and understands in accepting this lease renewal and amendment that the interest created therein may be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and paid by the Lessee.

13. *Reservation of Rights.* Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in paragraphs 3 and 4 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being *Western Oil and Gas Association, et al. v. Cory, et al.*, U.S.D.C. (E.D. Cal.), No. CIV S-76-513 and *Western Oil and Gas Association, et al. v. California State Lands Commission*, Sacramento Superior Court No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of the minimum annual rental specified in Subparagraphs 3(c) and 4(c) hereof, in an interest-bearing Special Deposit Account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee, subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the Special Deposit Account. Notwithstanding the foregoing, in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Subparagraphs 3(c) and 4(c) hereof, it being expressly acknowledged by Lessee that annual rental in that fixed

amount is reasonable and within Lessor's statutory authority. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered, under paragraph 20 of the Lease, to impose a reasonable rental for the lease period commencing April 1, 1976.

All other terms and conditions of Lease PRC 600.1 shall remain in full force and effect.

The effective date of this Renewal and Amendment shall be and is April 1, 1976. This agreement will become binding on the Lessor only when duly executed on the behalf of the State Lands Commission of the State of California.

In Witness Whereof, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated August 8, 1978]

[Miscellaneous approvals and certifications and property description omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

SUPPLEMENTAL DECLARATION OF KENNETH T. PALMER IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Kenneth T. Palmer, declare:

1. I am the same Kenneth T. Palmer who filed an affidavit in this proceeding, dated December 3, 1976, a copy of which is annexed as Exhibit 1 hereto. I am presently employed by Pacific Refining Company ("Pacific") as the Vice President/Refinery Manager for Pacific's refinery located in Hercules, California. As Refinery Manager, I am responsible for and am familiar with all operations at the refinery, including receipt of crude oil and shipment of petroleum products. I am also fully familiar with the operation of facilities located in San Pablo Bay on land leased from the State of California.

2. Pacific presently owns and operates a wharf and pipeline facilities in the San Pablo Bay located on tide and submerged land owned by the State of California, leased by the State Lands Commission ("SLC"), and designated Lease No. P.R.C. 3414.1. A true copy of this lease is attached as Exhibit A to my affidavit, Exhibit 1 hereto.

3. The land leased from the State of California in San Pablo Bay is totally undeveloped tide and submerged land. The only improvements to this land have been made by Pacific or Pacific's predecessors in interest at a cost of approximately $1,500,000. In addition, a major marine accident in 1978 resulted in wharf repair costs of approximately $750,000. The State of California has never provided any services in connection with the maintenance or operation of the wharf or pipeline facilities constructed by its lessees.

In order to continue the use of these improvements, Pacific is required, at its own expense, to fully maintain the facilities and dredge the submerged lands. As an example, the cost of dredging operations in 1979 alone was approximately $200,000.

4. Pacific made these substantial investments in a wharf and pipelines and continues to properly maintain these improvements at great expense because without these facilities the refinery would have to be shut down since it could not receive adequate supplies of crude oil to run the refinery. The Hercules refinery is adjacent to the state's land on approximately 100 acres of land owned in fee by Pacific. Pacific has invested approximately $43,000,000 in the Hercules refinery. To operate the refinery, it is indispensable that Pacific be able to cross the leased land: There is simply no other means available to Pacific to transfer the needed amount of crude oil and other commodities between the refinery and vessels at sea.

5. I attach hereto as Exhibit 2 the Affidavit of Clinton B. Fawcett, dated December 3, 1976, and filed previously in this proceeding. Mr. Fawcett was then Vice President of Pacific. He describes the April 1, 1976 acquisition by Pacific of the Hercules refinery and all assets used in its operation. Among those assets was the lease from the State of California that I have previously mentioned, Lease No. P.R.C. 3414.1. In order to obtain the required approval of the SLC for the assignment of this lease, Pacific was forced to consent to a volumetric rental rate for the use of the state's land. Pacific agreed to these terms solely because of the tremendous investment it had just made in purchasing the Hercules refinery and the facilities on the state's land in San Pablo Bay.

6. Since the assignment of this lease to Pacific, the SLC has calculated the rental to be collected as follows. First, there is a minimum annual rental of $32,500 which is the sum of $6,600 for the land crossed by the pipeline facilities

(computed at the rate of one and one-half cents per diameter inch per lineal foot, plus $25,000 for the land under and around the wharf (computed at the rate of 8% per annum of the appraised value of said land, rounded to the nearest $100).

7. In addition, the SLC insisted that there be a throughput charge. A minimum annual rental of $32,500 is due on or about the twentieth day after November 17 of each lease year. The throughput charge is $0.01 per barrel until the minimum annual rental payment has been equalled (3,250,000 barrels × $.01 = $32,500). Then, the throughput charge is as follows:

$0.001 per barrel for the next 7,000,000 barrels

$0.003 per barrel for the next 20,000,000 barrels

$0.006 per barrel for the next 20,000,000 barrels

$0.009 per barrel for each additional barrel

The total lease year rental for this parcel of tide and submerged land is:

Lease Period	$
November 18, 1976—November 17, 1977	94,919
November 18, 1977—November 17, 1978	105,738
November 18, 1978—November 17, 1979	104,053
November 18, 1979—August 17, 1980 (9 Months)	60,777

Based on the SLC's appraisal of the leased land, the state will receive an annual rate of return on its unimproved land of 28% for 1976-1977, 29% for 1977-1978 and 29% for 1978-1979.

8. This additional throughout charge is solely for the privilege of crossing the state's land. During my employment at the Hercules refinery for the lease years 1976 through 1979, 97.8% of the crude oil received by Pacific has been from foreign sources. The foreign source crude oil has been carried in oceangoing tankers, traversed international waters, and traveled in foreign commerce. Over

99% of the domestic crude oil has been carried to the refinery in oceangoing tankers, traversed international waters and traveled in interstate commerce. The crude oil is then transferred from these vessels to the refinery by means of the wharf and pipelines of San Pablo Bay.

In addition, cargoes of petroleum products are regularly shipped from and are occasionally received at the refinery by Pacific. These products are transferred between oceangoing tankers or barges and the refinery by means of the wharf and pipelines. During each voyage to or from the refinery, the oceangoing tankers and barges have carried petroleum products across the navigable waters of the United States and the oceangoing tankers have carried said products across international waters.

If I were called as a witness in the above proceedings, I would testify to the above facts under oath, and I declare under penalty or perjury that the foregoing facts are true and correct.

Dated at Hercules, California, this 29th day of October, 1980.

/s/ Kenneth T. Palmer

Exhibit 1

Affidavit of Kenneth T. Palmer

State of California
City and
County of San Francisco
ss.

I, Kenneth T. Palmer, being first duly sworn, depose and say:

1. I have personal and firsthand knowledge of the matters testified to in this affidavit and am competent to testify to the following:

2. I am presently employed by Pacific Refining Company ("Pacific") in the position of Refinery Manager at Pacific's refinery in Hercules, California ("the refinery"). As Refinery Manager I am responsible for and am familiar with all of the operations at the refinery, including receipt and refining of crude oil and shipment of petroleum products. I was first employed by Pacific in this capacity on March 10, 1976. Since April 1, 1970, I have been employed continuously at the refinery, first as Manager of Engineering for Sequoia Refining Corporation ("Sequoia") and thereafter as Manager of Engineering and then Operations Manager for Gulf Oil Company ("Gulf").

3. As part of my duties for Pacific and earlier for Gulf and Sequoia, I am and have been fully familiar with the operations of the wharf and pipeline facilities located on and crossing tide and submerged lands in San Pablo Bay. The land upon which these facilities were constructed was leased from the State of California pursuant to Lease P.R.C. 3414.1. A copy of the Lease Agreement is attached hereto as Exhibit A. The wharf and pipelines are at the locations shown on the map attached hereto as Exhibit B. The wharf, which is entirely surrounded by the navigable waters of San Pablo Bay, and the pipeline facilities were constructed by Sequoia and Gulf with no contribution being

made by the State of California. The State of California has never provided any services in connection with the maintenance or operation of the wharf or pipeline facilities. Pacific now is, as were Gulf and Sequoia, totally dependent upon the above-mentioned wharf and pipelines as the sole means for transporting crude oil to and certain petroleum products from the refinery. Without these facilities the refinery would have to be shut down since it could not be supplied with crude oil.

3. During my employment at the refinery by Sequoia, Gulf and Pacific, all crude oil received has been carried in oceangoing tankers which have traversed international waters. All of the crude oil received by Pacific has been from foreign sources and none of the crude oil received by Sequoia or Gulf originated in California. All of the crude oil received has been transferred from vessels to the refinery by means of the facilities on the wharf and pipelines.

4. Cargoes of petroleum products are regularly shipped from and are occasionally received at the refinery by Pacific. These products are transferred to or from oceangoing tankers or barges by means of the wharf and pipeline facility. During each voyage to or from the refinery the oceangoing tankers and barges have carried said petroleum products across the navigable waters of the United States and the oceangoing tankers have carried said products across international waters.

5. Pursuant to the terms of Lease PRC 3414.1 as amended effective August 18, 1976, Pacific has paid to the State Lands Commission the following amounts for the calendar quarter beginning on August 18, 1976, and ending on November 17, 1976:

Minimum rental	\$8,125
Additional thruput charges	\$4,985.68

I estimate, based upon current level of operations at the refinery, that the additional thruput charges during the lease year beginning on November 18, 1976, and ending on November 17, 1977, will be $20,000.00.

/s/Kenneth T. Palmer

Subscribed and sworn to before me this 3rd day of December, 1976.

/s/Maurita R. King
Notary Public

[Seal]

[Remaining exhibits omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF EDWARD J. TAAFFE IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Edward J. Taaffe, declare:

1. I was an executive employee of the Land Department, Western Region of Chevron U.S.A. Inc. ("Chevron"), or its predecessor, continuously for the period January 2, 1940, until my retirement at the end of business on November 30, 1978. Among other duties, I had the responsibility for the supervision and administration of rights of way and leases for Chevron's various operating facilities, including State Lands Commission ("SLC") Lease No. P.R.C. 236.1.

2. Chevron presently owns and operates the Richmond Long Wharf which is located on tide and submerged land in Contra Costa County, owned by the State of California and leased from the SLC by Lease No. P.R.C. 236.1. True copies of the lease and subsequent renewals and amendments thereto are attached as exhibits in the following order:

Exhibit 1—Lease commencing August 19, 1947.

Exhibit 2—Amendment and renewal of lease dated June 15, 1973.

Exhibit 3—Extension and amendment of Lease No. P.R.C. 236.1 dated January 26, 1978.

3. The land leased from the State of California is totally undeveloped tide and submerged land. California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Chevron. In order to make the state's land usable, Chevron invested over $16,184,500.00 to construct the Richmond Long Wharf. In order to continue to use the wharf, Chevron is required

at its own expense to maintain it and dredge the submerged lands. For example, in 1976, Chevron spent over $850,000.00 for dredging alone.

4. Chevron made these substantial investments on the state's land and continues to properly maintain these facilities at great expense to enable Chevron to transport crude oil and refined product to and from its Richmond refinery. This refinery is adjacent to the state's land on approximately 3,160 acres owned by Chevron in fee. Chevron has invested in excess of $723,000,000.00 in this refinery. To operate the refinery, it is indispensable that Chevron be able to cross the state's land: there is no other means available to Chevron to transfer crude oil and other commodities between the refinery and vessels at sea.

5. From 1947 until the passage of the volumetric rental regulations, Chevron paid a rental to the SLC based on a reasonable rate of return on the appraised value of the leased land. For example, I was a participant in the negotiations resulting in the rental established for the lease period of August 19, 1967, through August 18, 1977. This rental was based entirely upon 6% of the appraised value of the land. Chevron's lease, Lease No. P.R.C. 236.1, provided that all renewals would be on "reasonable" terms, which Chevron believes to be a fair market rate of return on the appraised value of the leased land.

6. The renewal of Lease No. P.R.C. 236.1 expired August 19, 1977. Prior to that time, an application for a 10-year extension of lease was made by Chevron. During the negotiations for the lease extension, the SLC announced its intention to insist on the imposition of a volumetric rental. Chevron renewed its lease on this basis solely because of the tremendous investments that had been made on the land leased from the state and on the adjacent land owned by Chevron.

7. The renewed lease calculates the rent to be paid as follows. First, the SLC appraised the value of the land to be leased and applied an 8% return on the appraised value of the land. This amount, formerly the maximum rent and now the minimum rent, is $100,000.00 per year for 10 years.

8. In addition, the SLC requires a per barrel charge based on the total volume of commodities on and off loaded across the leased land. This per barrel rent will result in an additional charge over and above the minimum rent of $100,000.00 per year during the term of the lease of the following amounts:

Year	Amount
1977	$178,000 (actual)
1978	115,000 (actual)
1979	133,000 (actual)
1980	127,000 (approximate)
1981	133,000 (approximate)
1982	186,000 (approximate)
1983	198,000 (approximate)
1984	201,000 (approximate)
1985	201,000 (approximate)
1986	201,000 (approximate)

Based on the state's appraised value of the leased land, the SLC will receive an average annual net rate of return in each of said years in the amount of 21.5%, ranging from a low in 1978 of 17.2754% to highs for 1984, 1985 and 1986 of 24.1855%.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined product that passes over the state's land into or out of Chevron's Richmond refinery is subject to this charge. Of the commodities so transported through the Richmond Long Wharf, approximately 95% of the crude oil moves in interstate or foreign commerce, and approximately 90% of the refined product moves in interstate or foreign commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty of perjury that the foregoing facts are true and correct.

Dated at San Francisco, California, this 6th day of November, 1980.

/s/ Edward J. Taaffe

[Exhibits 1 and 2 omitted in printing]

Exhibit 3

State of California
State Lands Commission

Extension and Amendment of Lease P.R.C. 236.1

Whereas the State of California, acting through the State Lands Commission (herein called "Lessor"), and Chevron USA, Inc., a California corporation, as successor in interest to Standard Oil Company of California (herein called "Lessee"), are parties to an Agreement designated as Lease P.R.C. 236.1 and dated August 19, 1947, as amended by Amendment and Renewal of Lease P.R.C. 236.1 dated June 15, 1973, whereby Lessor granted to Lessee a lease covering certain described tide and submerged lands situate in Contra Costa County; and

Whereas by terms of the Lease, Lessee is entitled to extend the term thereof for three additional periods of ten years each upon such reasonable rental as Lessor might impose; and

Whereas Lessee has elected to extend the term of the Lease for an additional ten-year period to August 18, 1987; and

Whereas paragraph 16 of the Lease provides that the provisions hereof may be changed, altered or amended by mutual consent of the parties and the parties hereto desire to amend certain of such provisions and to incorporate certain other provisions not now contained therein:

Now, therefore, it is agreed by and between the parties hereto, as follows:

1. Extension of the Term. Pursuant to Lessee's election, the term of the Lease has been extended for a period of ten years beginning August 19, 1977 and ending August 18, 1987.

2. Amendment of Description of Demised Premises. The land description presently contained on page 2 of said Amendment and Renewal of Lease PRC 236.1 is hereby deleted in its entirety and there is substituted therefore that description shown on a map labeled Exhibit "A" attached hereto and by reference made a part hereof.

3. Annual Rental. Paragraphs 2 and 3 on page two of Lease PRC 236.1 dated August 19, 1947, and paragraph (2) of page 2 of Amendment and Renewal of Lease 236.1 dated June 15, 1973 are hereby deleted and the following substituted therefor:

"2. Monetary consideration: Commencing on August 19, 1977, and continuing through August 18, 1982, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U.S. gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land, shall accrue as such commodities pass over the State's land and shall be paid quarterly on or before December 10, March 10, June 10 and September 10 for the immediately preceding quarter of such lease year, as follows:

(a) Until the minimum annual rental provided for in subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 100,000,000 barrels beyond the number of barrels necessary to

satisfy the minimum rental under subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

(c) The minimum annual rental for each lease year shall be $100,000 and shall be due and payable on or before the first day of such lease year; provided, however, that the minimum annual rental for the lease year commencing August 19, 1977 shall be due and payable (without interest) upon execution and delivery of this Extension and Amendment of Lease PRC 236.1 and Lessee shall be allowed as a credit thereto the sum of $34,218.25 heretofore paid on account thereof.

(d) Rental shall not be imposed for passage of a commodity over the State's land if rental has already accrued on that identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are not identical to crude oil include, but are not limited to: fuel oils, diesel oils, gasoline, petrochemicals, kerosenes, jetfuels, naptha and other middle distillates.

(e) Rental based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall not accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands.

(f) Lessee shall, with each quarterly rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the demised premises. Lessee shall maintain for audit of

such statements and shall furnish on thirty days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets, and other pertinent documents, sufficient to determine the nature, quantity, origin/destination and ownership of commodities so received or shipped. Such source documents shall be maintained for a period of at least five years after their preparation.

(g) The annual rental provided for herein shall be paid to Lessor without deduction, delay or offset, at such place as may be designated by Lessor, and at the times specified herein. In the event of the termination of the Lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

4. *Annual Rental for Second Five Years of Extended Term.* For the period beginning August 19, 1982 and ending August 18, 1987 (herein called the "Second Five-Year Period"), annual rental shall be paid as follows:

(a) Until the minimum annual rental provided for in paragraph 3(c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil, and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(b) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 50,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under subparagraph (a) hereof: and thereafter $0.002 (2 mils) per barrel for next 50,000,000 barrels of such commodities passing

over the State's land in that same lease year; and thereafter $0.003 (3 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same lease year.

5. *Holding Over and Late Payments.*

(a) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of this lease extension agreed herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive rentals, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be construed as a limitation upon any other remedy which the State may have against a hold over Lessee.

(b) It is agreed by the parties hereto that any rentals accruing under the provisions of this extension and amendment that shall not be paid when due shall bear interest from the date when the same was payable by the terms hereof at the rate specified in Public Resources Code Section 6224, until the same shall be paid by the Lessee.

(c) The failure to pay rentals when due shall also subject the Lessee to a penalty of ten (10) percent of each delinquent rental payment.

6. Lessor reserves the right to periodically inspect the leased land and improvements located thereon to insure that Lessee's improvements comply with applicable State and Federal regulations.

7. Paragraphs 8 and 12 of said lease PRC 236.1 are hereby deleted and the following substituted therefor:

"8. INDEMNITY, BOND AND INSURANCE:

(a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California,

its officers, agents and employees against any and all claims, demands, loss, action or liability of any kind which State of California, or any of its officers, agents, or employees may sustain or incur or which may be imposed upon them or any of them arising out of or connected with the issuance of this amended lease, including, without in any way limiting the generality of the foregoing, any claim, demand, loss, or liability arising from any failure of title or any alleged violations of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease or any extension thereof, and an additional period of one hundred twenty (120) days or until the State has accepted a quitclaim deed and sufficient evidence of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of Five Hundred Thousand Dollars ($500,000), to guarantee to Lessor the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in this amended lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his expense and keep in full force and effect during the term of this lease, for the protection of Lessee and the State in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and the surrounding area with limits of not less than $1,000,000 for bodily injury and $10,000,000 for property damage. The policy or policies shall specifically name the State as an insured party as to the land

under the lease; and the policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that liability insurance coverage herein provided for shall be in effect all times during the term of this lease, and until said leased land is restored as nearly as possible to the conditions existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased land as then improved, Lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the condition existing prior to the erection and placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the term of this amended lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than (1) year, or for not less than the remainder of this amended lease, and until the leased land is restored or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the State Lands Division, and Lessee agrees that no construction, improvements, additions, work or services shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insur-

ance coverage as herein provided, State may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

9. *Oil Spill Emergency.* In the event of a spill or leak of oil or other liquid pollutants into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services via the toll-free 24-hour service telephone number 1-800-852-7550. For spills of 10 barrels or more, Lessee shall report directly to the State Lands Division 24-hour service telephone number (213) 590-5201. Information to be reported shall include, but not be limited to:

> The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the water body affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and the action taken.

10. *Marine Terminal/Wharf Operations.* Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State regulations and guidelines covering Lessee's operations on and about the demised premises. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

11. *Repossession.* In the event of failure of Lessee to pay rental, or in the event of a breach of any of the other covenants contained within the lease, as herein amended, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom and to repossess and

enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period and to diligently pursue to conclusion the actions necessary to cure such default, and, so long as such default is cured within such prescribed time limits, Lessor shall not repossess the demised premises as provided herein.

12. *Possessory Interest.* Lessee recognizes and understands in accepting this lease extension and amendment that his interest created therein may be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and paid by the Lessee.

13. *Reservation of Rights.* Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in paragraphs 3 and 4 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being Western Oil and Gas Association, et al. V. Cory, et al., U.S.D.C. (E.D. CAL.), No. CIV S-76-513 and Western Oil and Gas Association, et al. V. California State Lands Commission, Sacramento Superior Court No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of minimum annual rental of $100,000 set forth in Paragraph 3 (c) hereof in an interest-

bearing Special Deposit Account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the Special Deposit Account. Notwithstanding the foregoing in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Subparagraph 3 (c) hereof, it being expressly acknowledged by Lessee that annual rental in that fixed amount is reasonable and within Lessor's statutory authority. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered, under Paragraph 17 of the Lease, to impose a reasonable rental for the 10-year period commencing August 19, 1977.

All other terms and conditions of Lease PRC 236.1 shall remain in full force and effect.

The effective date of this Amendment shall be and is August 19, 1977. This Agreement will become binding on the Lessor only when duly executed on the behalf of the State Lands Commission of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated March 7, 1978]

[Subscriptions, acknowledgment, and property description omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

DECLARATION OF MILFORD S. WALLER IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, Milford S. Waller, declare:

1. I am employed by Shell Oil Company in the capacity of Staff Engineer and have been so employed since 1967. Among other duties, I have the responsibility for the supervision and administration of rights of way and leases for various operating facilities, including State Lands Commission ("SLC") Lease No. P.R.C. 4908.1.

2. Shell Oil Company presently owns and operates the Martinez Wharf (the "Wharf") which is located on tide and submerged land in Contra Costa County, owned by the State of California and leased from the SLC by Lease No. P.R.C. 4908.1. True copies of the lease and subsequent renewals and amendments thereto are attached as exhibits in the following order:

a. Renewal and Amendment of Lease P.R.C. 543.1 dated May 16, 1974, effective August 1, 1974.

b. Amendment of Lease P.R.C. 4908.1 dated 11/5/79, effective August 1, 1979, and covering throughput charges.

c. Amendment of Lease P.R.C. 4908.1 dated 4/29/80, effective April 1, 1980, and covering modernization of Wharf.

d. *Proposed* amendment to P.R.C. 4908.1 signed by Shell on June 19, 1980 and covering operation of the Wharf.

3. The land as leased from the State of California is totally undeveloped tide and submerged land. California provides no services, facilities or improvements of any nature. The only improvements to this land have been made by Shell Oil Company. In order to make the state's land usable, Shell Oil Company invested over $3 million to construct the Wharf, causeway, necessary dolphins, piling, and Wharf pipelines for the transportation of petroleum products. Replacement value for this facility is $10 million. In order to continue to use the Wharf, Shell Oil Company is required at its own expense to maintain it and dredge the submerged lands. For example, in 1964, Shell Oil Company spent over $73,000 for dredging alone.

4. Shell Oil Company made these substantial investments on the state's land and continues to properly maintain these facilities at great expense to enable us to transport crude oil and refined product to and from our Martinez manufacturing complex. This chemical and refining complex is adjacent to the state's land on approximately 1100 acres owned by Shell Oil Company in fee. Shell Oil Company has invested in excess of $251 million in this complex. To operate the complex, it is indispensable that we be able to cross the state's land: there is no other means available to transfer crude oil and other commodities between the complex and vessels at sea.

5. From 1948 until the passage of the volumetric rental regulations, Shell Oil Company paid a rental to the SLC based on a reasonable rate of return on the appraised value of the leased land. Shell Oil Company's lease, Lease No. P.R.C. 4908.1, provided that all renewals would be "reasonable" terms, which we believe to be a fair market rate of return on the appraised value of the leased land.

6. The renewal of Lease No. P.R.C. 4908.1 expired on August 1, 1979. Prior to that time, an application for a 10-year extension of lease was made by Shell Oil Company.

During the negotiations for the lease extension, the SLC announced its intention to insist on the imposition of a volumetric rental. Shell Oil Company renewed its lease on this basis solely because of the tremendous investments that had been made on the land leased from the state and on the adjacent land owned by Shell Oil Company.

7. The renewed lease calculates the rent to be paid as follows: First, the SLC appraised the value of the land to be leased and applied an 8 percent return on the appraised value of the land. This amount is $60,000 per year.

8. In addition, the SLC requires a per barrel charge based on the total volume of commodities on and off loaded across the leased land. This per barrel rent will result in an additional charge over and above the minimum rent of $60,000 per year during the lease year, August 1, 1979 to July 31, 1980 of $62,374. Based on the state's appraised value ($753,357 @ $.90/sq. ft.) of the leased land, the SLC will receive an average annual net rate of return in the amount of 17.57 percent.

9. The additional throughput charge described in the last paragraph is imposed solely for the privilege of crossing the state's land. Every barrel of crude oil and refined produce that passes over the state's land into or out of the complex is subject to this charge. Of the commodities so transported over the Wharf, 100 percent of the crude oil moves in interstate or foreign commerce, and 41 percent of the refined product moves in interstate or foreign commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty of perjury that the foregoing facts are true and correct.

Dated at Martinez, California, this 6th day of November, 1980.

/s/ Milford S. Waller

[Exhibits a-c omitted in printing]

Exhibit d

June 19, 1980

State Lands Commission
ATTN Mr Gary Horn
1807 - 13th Street
Sacramento, CA 95814

Gentlemen:

RE: FILE REF. PRC 4908.1—AMENDMENT TO WHARF LEASE

Attached are two executed copies of revised Lease Amendment based on your transmittals of February 25, 1980 and March 17, 1980. As discussed with Mr. M. S. Waller, we have revised items (a) 1 and 2 to reflect our current wharf manning and personnel titles. Both the Dispatching Operations Foremen and the Wharfman-in-Charge are designated to the United States Coast Guard as persons-in-charge of the wharf under Coast Guard regulation 154.710, with the Wharfman-in-Charge stationed at the vessel and carrying out the primary responsibility for the transfer.

We object to the effective date of the amendment being March 1, 1980, and have changed this to July 1, 1980, since the date of submission of the operations manual is one year from the effective date.

Very truly yours,

R. F. Andrews
Technical Superintendent
Martinez Manufacturing
Complex

MSW:cl
Attachments
cc: R. A. Wilson (without attachment)
R. M. Kingsbury (without attachment)
L. D. Ross (with attachment)
J. A. Sprecher (with attachment)
D. L. Morrison (with attachment)
J. C. Miller (with attachment)
R. F. Andrews (with attachment)
M. S. Waller (with attachment)

R. J. Bertus—Operations Fuel—Logistics Manager—West Coast and Southwest—Head Office (with attachment)
"d"

State of California
State Lands Commission

Amendment of Lease PRC 4908.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor and Shell Oil Company, as Lessee, made and entered into a Lease Agreement, designated Lease PRC 4908.1 covering certain tide and submerged land situated in Contra Costa County; and

Whereas, the State Lands Commission has expressed concern that petroleum terminal operations on lands under its jurisdiction should be conducted in as safe a manner as possible; and

Whereas, the Commission staff, in concert with petroleum and utility industry representatives has developed lease conditions that would be included as part of all existing and any future marine transfer facilities; and

Whereas, the Commission has, by resolution, adopted such standard provisions, covenants and restrictions for operation of marine petroleum transfer facilities on State lands; and

Whereas, Lease PRC 4908.1 provides that said Agreement may be terminated, the provisions altered, changed or amended by mutual consent of the parties; and

Whereas, by reason of the foregoing, it is now the desire of the parties to amend the aforesaid Agreement.

Now therefore, it is agreed by and between the parties hereto as follows:

Not withstanding any other provision of this lease the following provisions shall apply to this lease:

(a) Lessee shall have specifically designated personnel (Persons-In-Charge) who shall be responsible for assuring that the terminal-related portion of any loading, unloading or bunkering operations is carried out

in a manner which is safe and will not pollute the surrounding waters.

1. There shall be a designated person-in-charge (the Dispatching Operations Foreman-West or his alternate, the Operations Foreman-East) of the terminal premises at all times during transfer activities over the Wharf and at any time a vessel being loaded, unloaded, or bunkered is at the Wharf. Such person shall be specifically trained to carry out his or her responsibilities with respect to this transfer and shall have the authority to take all actions, including starting and stopping transfer operations, conducting business with representatives of any governmental authority and initiating spill clean up and containment operations, necessary to assure that loading, unloading and bunkering operations are conducted in a manner which is safe and will not pollute the surrounding waters.

2. In addition to the Operations Foreman, there shall be at least one Wharfman-in-Charge stationed at the Wharf at all times transfer operations are occurring who has been specifically trained to carry out loading, unloading, and bunkering operations in a manner which is safe and will not pollute the surrounding waters.

(b) Lessee shall take reasonable steps, including but not limited to, periodic unannounced inspections of the terminal facility and its transfer operations to ensure that terminal personnel at such facility, and specifically those engaged in such operation, are observing: (1) applicable Federal, State and local laws and regulations; and (2) prudent working practices, i.e. terminal personnel are alert, have not been on duty for an unreasonable period of time and are not under the influence of alcohol or drugs. Subsequent to such inspections, Lessee shall file a report summarizing its

findings and enumerating deficiencies, if any, and recommended or established procedures to correct such deficiencies. These operational reports shall be maintained at the facility for a period of one year and will be accessible for review by the staff of the Commission and other public safety agencies such as the U. S. Coast Guard. In addition to such inspections of routine operations, the personnel and equipment, if any, at the terminal shall be subjected to periodic fire safety and oil spill training and drills. Such training and drills will be conducted on a periodic basis, which shall be designated in Lessee's terminal operations manual.

(c) Lessee's terminal facility shall have an oil spill containment and clean up plan. Oil spill containment booms and other oil spill equipment shall be available to the terminal by means of either (1) owned or leased equipment with trained manpower at the terminal site, or (2) contractor equipment and manpower readily available in the harbor area, or (3) oil spill cooperative arrangements for equipment and manpower and other terminal operators in the harbor area, or (4) a combination of the above.

Such oil spill containment and clean up plan shall be a part of the operations manual and shall be submitted to the State Lands Commission staff for review and comment. In making modifications, if any, to the plan and/or the oil spill clean up equipment available pursuant to such plan, effective consideration shall be given to the State Lands Commission's comments. Prior to the submission of such comments, the Commission staff shall consult with the U. S. Coast Guard.

(d) Lessee's terminal facility shall have an operations manual which has been reviewed and accepted by the U. S. Coast Guard as soon as practicable, but in no case more than one year from the effective date of these lease provisions. The manual or any amendment

thereto shall also be submitted to the State Lands Commission for review and comment at the earliest practicable time, but not later than its submission to the Coast Guard as provided herein and under federal rules and regulations.

(e) Lessee shall ensure that an effective communication system is available and in operation between the vessel and shore terminal personnel at all times when transfer operations are occurring. If, for any reason, the communication system becomes inoperable, transfer operations shall be suspended using the procedures in the terminal operations manual.

(f) 1. Subsequent to the completion of berthing and prior to the commencement of loading or unloading operations, Lessee shall satisfy itself that the vessel is operating with a Federal Maritime Commission Certificate of Financial Responsibility and under a valid Coast Guard certificate of inspection in the case of a United States flag vessel or documentation indicating the results of the latest Coast Guard inspection of the vessel in the case of a foreign flag vessel. Lessee shall also assure, from the vessel master, that all equipment and procedural deficiencies noted by the Coast Guard have been or are being corrected in the manner prescribed by the Coast Guard, and that a declaration of inspection has been executed prior to bulk cargo transfer verifying that a vessel inspection has been conducted by vessel personnel. The declaration of inspection shall include all inspection items set forth in the operations manual. The terminal operator shall also verify that terminal inspection has been conducted by terminal personnel prior to commencement of the transfer operations.

2. A copy of each declaration of inspection prior to bulk cargo transfer shall be maintained by Lessee

for a period of at least one year from the date such declaration is executed. The declaration shall promptly be made available to State Lands Commission representatives upon demand.

3. Lessee shall ensure that the declaration of inspection contains, at a minimum, those items listed on Exhibit "A" attached hereto and by reference made a part hereof.

All other terms and conditions of Lease PRC 4908.1 shall remain in full force and effect.

The effective date of this Agreement shall be and is July 1, 1980 and this Agreement will become binding on the Lessor only when duly executed on behalf of the State Lands Commission of the State of California.

In Witness Hereof, the parties hereto have executed this Agreement as of the date hereafter affixed.

Lessee—Shell Oil Company	State of California State Lands Commission
By: /s/ O. L. Wood	By:
Title Manager Martinez Manufacturing Complex	Title
Date June 19, 1980	Date
(Seal)	This issuance of this amendment was adopted by the State lands Commission on ____________________

Exhibit A

Items for Inclusion On Facility and/or Vessel Check-off Lists

No.	Item Description	Facility	Vessel
1.	The Persons-in-Charge shall speak fluent English. If not possible, a person who speaks fluent English shall be stationed near the shut-down button or valve and shall maintain continuous communication with the terminal and vessel Persons-in-Charge.	X	X
2.	The vessel shall have a red flag or light. Warning signs on the wharf, gangway, radio room, and off-shore side of the vessel shall be in place.		X
3.	Vessel mooring lines shall be strong enough to hold in and be of sufficient length to adjust to expected conditions.		X
4.	The vessel cargo transfer system shall be aligned and ready to transfer. Unnecessary or unused manifold connections shall be blanked off using adequate gaskets and at least 4 bolts, or an approved blanking device. The transfer system shall be connected to a fixed piping system.		X
5.	All overboard discharge and sea suction valves connected to oil transfer system, dirty ballast, or cargo tanks shall be closed and sealed, or lashed.		X
6.	The loading hose must have no loose covers, kinks, bulges, soft spots and no gouges, cuts or slashes that penetrate the hose reinforcement. Loading hoses or arms must be long enough to allow ship movement and must be supported so as to prevent strain on the hose or arm coupling.	X	X
7.	Suitable material must be used in joints and couplings to make a tight seal. Hose connections must be made with the proper size bolts		

No.	Item Description	Facil-ity	Ves-sel
	in at least every other hole with ANSI standard flanges or with a USCG approved quick disconnect coupling. Permanent hose connections and other ANSI connections shall have a bolt in every hole.	X	X
8.	The vessel must have a containment system under or around each manifold, connection, vessel fuel tank vent, and overflow and fill pipe which complies with Coast Guard regulations. Each scupper or drain in the discharge containment system must be closed.		X
9.	The Person-in-Charge shall remain in the vicinity of the transfer operation and be available to the oil transfer personnel to supervise connections, disconnections, topping off and emergency shutdowns, if needed.	X	X
10.	No fire or open flame will be permitted during transfer operations. All repair work on the vessel or wharf which can serve as an ignition source must have prior Coast Guard approval and, where required, approval by local fire and harbor officials. Power or manual spark producing devices shall not be operated on weather decks, in pumprooms, in cargo or fuel tanks, or in compartments which may accumulate vapors. Boiler and galley fires must not constitute a fire hazard.	X	X
11.	The vessel and shore facility will have adequate lighting to safely conduct the transfer operation.	X	X
12.	Smoking shall be permitted only in approved areas. "No smoking" signs shall be conspicuously posted in all other areas.	X	X
13.	A pre-transfer conference must be held by the Persons-in-Charge covering: products; discharge sequence and rates; names of persons involved; transfer system details and critical		

No.	Item Description	Facility	Vessel
	stages; applicable rules; emergency, discharge containment and reporting, and shutdown procedures; and shift change procedures.	X	X
14.	Sufficient crewman to get the vessel underway in an emergency shall remain aboard the vessel, if self-propelled, at all times. Emergency towing wires shall be rigged outboard fore and aft and maintained within 2 meters of the water surface while the vessel is moored alongside a wharf. The engines and vessel shall be kept ready to depart within 30 minutes in an emergency and whenever possible the vessel shall be moored so as to facilitate departure. If the engines are down, one or more tugs, depending on vessel size, shall be on standby call.		X
15.	The terminal and vessel Person-in-Charge shall indicate and acknowledge to each other that they are ready to transfer prior to starting the operation.	X	X
16.	Intoxicated and disorderly persons shall not be permitted on the terminal premises or aboard the vessel, except crewmen who are escorted from the gate to the vessel by the ships' personnel when transfer operations are not occurring. It shall be the responsibility of the vessel Person-in-Charge to ascertain whether vessel personnel are intoxicated and disorderly and it shall be the responsibility of the terminal Person-in-Charge to ascertain whether terminal personnel are intoxicated and disorderly.	X	X
17.	All vessel cargo and personnel compartment openings will be closed during transfer, except when required to be temporarily opened. Pressure relief valves and cargo vents shall be fitted with Coast Guard approved flame screens. When open, ullage holes shall be fitted with		

No.	Item Description	Facil-ity	Ves-sel
	Coast Guard approved flame screens. Flame screens shall be of the proper size and in good condition. Vent piping shall be sound and free of leaks.		X
18.	Sufficient servicable fire equipment with suitable nozzles shall be attached to the fire main and shall be ready for instant use. There shall be adequate water pressure to supply at least 50 lbs. of pressure at each nozzle. There shall be at least five portable class BC fire extinguishers with capacities of not less than 20 lbs. each on deck. Two shall be located at each side of the manifold and one at the gangway or accommodation ladder. All fire extinguishers shall be approved by the appropriate authority of the vessel's flag country.	X	X
19.	All transfer system connections and pressure gauges shall be monitored to check for leaks and to ensure that the maximum working pressure is not exceeded.	X	X
20.	Provisions shall be made to ensure that all spills are reported immediately to the Persons-in-Charge.	X	X
21.	Electrical equipment shall be approved for the hazardous area it is used in. All electrical installations in the pumproom shall be either explosion-proof and/or intrinsically safe except when handling only grade E cargo. All wiring in hazardous areas shall be in good condition. Electrical cables to portable equipment shall be disconnected unless certified for use in hazardous areas.	X	X
22.	If electrical bonding is used, it shall be activated by an approved switch prior to the cargo hose disconnection and spillage removal. The bonding system shall have a means of indicating continuity of the bond.		X

No.	Item Description	Facil-ity	Ves-sel
23.	The facility Person-in-Charge shall have the cargo information card for each cargo being handled immediately available.	X	
24.	All communication equipment used in the transfer operation shall be tested and properly working. Tests shall be made immediately prior to transfer and hourly thereafter.	X	X
25.	Cargo decks of the vessel shall remain free of dirty rags, rubbish, debris and loose tools. Excess hydrocarbon leakage in pumproom bilges shall not be permitted.		X
26.	All cargo transfer, except transfer of high pour-point crude products, and tank cleaning operations shall be immediately shutdown if any of the following occurs: a. A severe electrical storm. b. A fire on the vessel, at the wharf or in the vicinity of either. c. Sufficient competent personnel are not present during cargo handling or a language barrier develops between the vessel and the facility. d. If a break occurs in the transfer system, cargo is leaking at the joints or connections at a rate exceeding the capacity of the containment system, or if a spill occurs. e. If a serious vapor condition develops aboard or around the vessel or facility. f. If an emergency arises which may result in a spill or affect the safety of the transfer of high pour-point crude or products may continue in spite of the occurrence of (a) through (f) until preparation can be made to prevent damages to the transfer piping and equipment if doing so would not present an immediate risk of fire; explosion or cargo spillage.	X	X

No.	Item Description	Facil-ity	Ves-sel
27.	Cargo transferring shall begin slowly. Couplings and hoses shall be inspected for leaks prior to transferring at operating pressure, and during the transfer operation.	X	X
28.	The vessel Person-in-Charge must notify the facility Person-in-Charge that he is ready for final topping-off. This will proceed at an agreed upon loading rate.	X	X
29.	Access to the facility shall be unobstructed. Non-spark proofed motor vehicles shall not be operated in the immediate vicinity of a tank vessel during transfer operations.	X	
30.	If the vessel design permits, all air intakes which may take in vapors or are in the immediate vicinity of a cargo tank opening or venting point shall be closed. Compartment air intake vents shall be trimmed away from the the cargo area to prevent intake of vapor. Window-type air conditioning units facing cargo areas shall be disconnected.		X
31.	The main transmitting antennae shall be switched off and grounded.		X
32.	The facility Person-in-Charge shall satisfy himself that the vessel is operating under a valid Coast Guard certificate of inspection in the case of a United States flag vessel or documentation indicating the results of the latest Coast Guard inspection of the vessel in the case of a foreign flag vessel.	X	
33.	The vessel Person-in-Charge shall provide assurance that all equipment and procedural deficiencies noted by the Coast Guard have been or are being corrected in the manner prescribed.		X

[Certificate omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Nov. 26, 1980]

SUPPLEMENTAL DECLARATION OF B. R. SWANSON IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT

I, B. R. Swanson, declare:

1. I am the same B. R. Swanson who filed an affidavit in this proceeding, dated November 22, 1976, a copy of which is annexed as Exhibit I hereto. I am presently employed by Tosco Corporation ("TOSCO"). as Transportation Manager. In this position, I have responsibility for the supervision and administration of certain rights of way and leases for Tosco's various operating facilities, including State Lands Commission ("SLC") Leases Nos. P.R.C. 3453.1 and 3454.1.

2. Tosco presently owns and operates a wharf facility on property known as the Amorco Terminal. This terminal is located in substantial part on tide and submerged lands in Contra Costa County owned by the State of California and leased from the SLC. Lease No. P.R.C. 3453.1 covering the Amorco Terminal and related assignments and amendments are attached hereto as Exhibit 2. Tosco additionally owns and operates a wharf facility on property known as the Avon Terminal. This terminal is located in substantial part on tide and submerged lands in Contra Costa County owned by the State of California and leased from the SLC. Lease No. P.R.C. 3454.1 covering the Avon Terminal and related assignments and amendments are attached hereto as Exhibit 3.

3. The land leased from the State of California was totally undeveloped tide and submerged land. In order to make the leased land usable, Tosco and its predecessors have invested over $1,970,000.00 in constructing the Amorco

Terminal and over $580,000 in constructing the Avon Terminal. The State of California has never provided any services in connection with the maintenance or operation of these terminals. In order to continue the use of these improvements, Tosco must maintain these facilities at its own expense. As an example, these submerged lands must be dredged periodically, and in 1977 Tosco spent $98,000 for dredging near the Amorco Terminal. Dredging costs at the Avon Terminal are estimated to cost $100,000 in 1981. Tosco and its predecessors made these substantial investments on the lands leased from the State of California because the State of California controls all the available lands in the area suitable for the conduct of Tosco's wharf operations.

4. The Amorco and Avon Terminals were designed to serve Tosco's Avon Refinery. The refinery is adjacent to the State's land on approximately 2,114 acres of Tosco's fee owned land. Tosco and its predecessors has invested in excess of $100,000,000.00 in constructing the refinery. To operate the refinery, crude oil and refined product must be transferred between the refinery and ocean vessels. The leased land is therefore indispensible: Tosco must cross state tide and submerged lands.

5. Before the 1976 passage of the volumetric rental regulations, Tosco paid to the SLC a rental based on a reasonable rate of return on the appraised value of the leased land. Tosco's leases provided that all renewals would be on "reasonable" terms, which Tosco believes to be the fair market rate of return on the appraised value of the land.

6. Nevertheless, by letters dated October 18, 1976, and April 12, 1979, the SLC announced its intentions to impose a volumetric rental on each of Tosco's leases. Tosco renewed its leases on this basis because Tosco must cross State tide and submerged land to have access to ocean going vessels, and because of the tremendous investments

that had been made on the land leased from the State and on Tosco's adjacent land.

7. The renewed leases calculate the rent to be paid as follows. First, the State has appraised the value of the land to be leased and applied an eight percent (8%) return on that appraised value. This amount, formerly the maximum rent, is now the minimum rent. For the Amorco Terminal (Lease No. P.R.C. 3453.1), the minimum rent is $42,000.00 each year. For the Avon Terminal, (Lease No. P.R.C. 3454.1), the minimum rent is $30,000.00 each year.

8. In addition, the SLC now imposes a throughput charge based on the volume of commodities passing over the leased lands at the Amorco and Avon Wharf facilities. This throughput charge is a sliding scale charge, which varies from one-tenth of one cent to one cent per barrel, which resulted in an annual charge of $31,830.00 over the minimum charge in 1979 for the Amorco Terminal (Lease No. P.R.C. 3453.1), and which is estimated to be approximately the same amount in 1980. For the Avon Terminal, (Lease No. P.R.C. 3454.1), the annual charge in 1980 is estimated to be approximately $10,000 over the minimum charge. Based on the State's appraisal of the leased land, it is calculated that the State will receive an annual net rate of return of approximately 14.0 percent for the Amorco Terminal (Lease No. P.R.C. 3453.1) and 10.6 percent for the Avon Terminal (Lease No. P.R.C. 3454.1).

9. The additional throughput charge described in the last paragraph is imposed for the privilege of crossing the State's land. Every parcel of a commodity that enters or leaves the wharf facilities at the Amorco and Avon terminals is subject to this charge. These commodities are frequently moving in interstate or foreign commerce. As for commodities crossing the Amorco wharf into or out of the Avon Refinery in 1980, approximately 10 percent is in

foreign commerce, 11 percent is in intrastate commerce and 79 percent is in interstate commerce. As for commodities crossing the Avon wharf into or out of the Avon Refinery in 1980, approximately 5 percent is in foreign commerce, 54 percent is in intrastate commerce and 41 percent is in interstate commerce.

If I were called as a witness in this proceeding, I would testify to the above facts under oath, and I declare under penalty that the foregoing facts are true and correct.

Dated at Los Angeles, California, this 21st day of November 1980.

/s/ B. R. Swanson

Exhibit 1

AFFIDAVIT OF B. R. SWANSON

COUNTY OF LOS ANGELES)
STATE OF CALIFORNIA)

B. R. Swanson, being duly sworn, deposes and says:

1. I, B. R. Swanson, am employed by Lion Oil Company ("Lion"), Los Angeles, California, as Operations Manager, with management authority and responsibility over Lion's West Coast trucking and terminal operations, including the Diablo Terminal and State Lands Commission ("SLC") Lease No. P.R.C. 2757.1 hereinafter mentioned, as well as all other properties and SLC leases and easements.

2. Lion presently owns and operates a marine terminal (with deep water dock and loading facilities), referred to as its Diablo Terminal which terminal is located in substantial part on tide and submerged lands owned by the State of California in Contra Costa County, which lands are covered by a lease with the State Lands Commission ("SLC"), designated as Lease No. P.R.C. 2757.1, as renewed by Renewal and Amendment of Lease P.R.C. 2757.1. Said lease was assigned to Lion, with the approval of the SLC, by Phillips Petroleum Company in March of 1976. A copy of said lease and assignment is attached hereto as Exhibit "A".

3. California does not own any of the facilities located on the land covered by Lease No. P.R.C. 2757.1 as renewed and amended. California provides no facilities or services in conjunction with said leased land or operations thereon.

4. Said terminal is used in the exporting and importing, by ship or barge, of petroleum coke and other products. All of the products transported over this facility are moving in interstate or foreign commerce, i.e. between states or with a foreign country.

5. In light of the bulk of the products being transported and the distance it is transported, much to Japan, it would

be impractical and prohibitively expensive to transport such products by any means other than a seagoing vessel. It is necessary, therefore, that there be a terminal located on submerged and tide lands, deep water channel, for this purpose. Lion's Diablo Terminal is so located for such purpose, i.e. handling of loading and unloading of seagoing vessels in the transportation of petroleum coke (produced by Lion and others) and other products. Such terminal would have no value to Lion without the use of the adjoining submerged and tidelands owned by the State of California and leased to Lion under Lease No. P.R.C. 2757.1, as renewed and amended.

6. At the time Lion took an assignment of Lease No. P.R.C. 2757.1, as renewed and amended, the rental provision fixed the annual rent at $9,266.40 per year. That figure is set forth in Renewal and Amendment of P.R.C. 2757.1, approved by the SLC in March of 1976. A copy of that renewal and amendment is attached hereto as part of Exhibit "A".

7. By letter dated July 29, 1976, purportedly pursuant to paragraph 2 of the aforementioned renewal and amendment, the SLC notified Lion of its intention to charge a volumetric rent under Lease No. P.R.C. 2757.1, as renewed and amended, in the amount of five cents per ton on any and all bulk commodities passing over Lion's terminal wharf. That letter further set a minimum annual rental at the same $9,266.40 annual rental figure previously fixed therein. A copy of that letter is attached as Exhibit "B".

8. In the past, approximately 400,000 tons of coke and other bulk commodities have passed over this terminal wharf annually and, assuming this experience to continue, the effect of the proposed five cents per ton throughput charge will be an increase in Lion's annual rental, over and above the $9,266.40 figure, and in an amount exceeding $19,000.00.

9. Attached hereto as Exhibit "C" is a true copy of letter notice dated October 18, 1976, SLC to Lion, respect-

ing proposed volumetric rental charges under proposed renewal of SLC Lease P.R.C. 3453.1 at Lion's Amorco Wharf, deep water, Contra Costa County, California.

10. I know the above from my own personal knowledge and could competently testify thereto.

/s/ B. R. Swanson
B. R. SWANSON

[Dated November 22, 1976]

[Acknowledgment and exhibits omitted in printing]

[Exhibit 2 omitted in printing]

Exhibit 3

State of California
State Lands Commission

Renewal and Amendment of Lease PRC 3454.1

Whereas, the State of California, acting through the State Lands Commission, as Lessor, and Tidewater Oil Company, as Lessee, made and entered into a Lease Agreement, designated Lease PRC 3454.1, covering certain tide and submerged land situate in Contra Costa County, which lease was issued March 23, 1966 by the State for a period of fifteen years commencing July 26, 1964; and

Whereas, said lease was, effective July 15, 1966, assigned, with approval of Lessor, to Phillips Petroleum Company; and

Whereas, said lease was amended by instrument dated July 10, 1974; and

Whereas, said lease was, effective March 31, 1976, assigned by Phillips Petroleum Company to Lion Oil Company, a Delaware Corporation, with approval of Lessor; and

Whereas, said lease was, effective January 30, 1978, assigned by Lion Oil Company to Tosco Corporation by way of merger, with the State's assent; and

Whereas, by terms of said Lease PRC 3454.1, Paragraph 20, Lessee was granted the right of renewal thereof for three additional periods of ten years each upon such reasonable terms and conditions as the State, or any successor in interest thereto, might impose; and

Whereas, Paragraph 19 of said lease PRC 3454.1 provides that the agreement may be terminated or the provisions changed, altered or amended by mutual consent of the parties; and

Whereas, Tosco Corporation, successor Lessee, has now formally exercised its right of renewal of said lease PRC 3454.1, for the first additional period of ten (10) years, upon the terms and conditions as hereinafter provided:

Now, therefore, it is agreed by and between the parties hereto as follows:

1. Lease PRC 3454.1 is hereby renewed for a period of ten (10) years beginning January 1, 1980 and ending December 31, 1989.

2. Effective July 26, 1979, Paragraphs 2 and 3 of original lease PRC 3454.1 and subsequent recitals of annual rent are hereby deleted and the following substituted therefore:

"2. Monetary Consideration: (a) For the interim period prior to commencement of the new lease year on January 1, 1980 and beginning July 26, 1979 and ending December 31, 1979, minimum rental for occupation of the lease land shall be $12,500. Such minimum rental shall be applied against a volumetric rental payable by Lessee for such interim period according to the following schedule:

$0.01 per barrel of crude oil, products and derivatives thereof passing over the State's land until the minimum rental for the interim period is equaled; thereafter

$0.001 per barrel for the next 3,000,000 barrels, passing over the State's land during the interim period; and thereafter

$0.003 per barrel for each additional barrel passing over the State's land during the interim period.

Such rental for the interim period shall be due on December 31, 1979 and shall be paid on or before January 31, 1980. Lessee shall be entitled to a credit of $8,069.78 against the minimum rental for the interim period, such amount having been paid on account.

(b) Commencing on January 1, 1980, annual rental shall be paid as follows:

Annual rental, based on the number of barrels (42 U. S. Gallons per barrel) of crude oil and products and derivatives thereof passing over the State's land shall accrue as such commodities pass over the State's land and shall be due at the end of each quarter of the lease year and shall be paid on or before the thirtieth day of the following month, as follows:

(1) Until the minimum annual rental provided for in Subparagraph (c) hereof is equaled in each lease year, the annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land by $0.01 (one cent).

(2) Thereafter, said annual rental shall be computed by multiplying the number of barrels of crude oil and products and derivatives thereof passing over the State's land in the same lease year according to the following schedule:

$0.001 (1 mil) per barrel for the next 7,000,000 barrels beyond the number of barrels necessary to satisfy the minimum rental under Subparagraph (a) hereof; and thereafter $0.003 (3 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease year; and

thereafter $0.006 (6 mils) per barrel for the next 20,000,000 barrels of such commodities passing over the State's land in the same lease; year; and thereafter $0.009 (9 mils) per barrel for each additional barrel of such commodities passing over the State's land in that same year.

(3) *Minimum Annual Rental*: The parties hereto agree that the minimum annual rental for the wharf site shall be $30,000 and shall be paid in advance by Lessee on or before January 1, 1980, and on each anniversary thereafter.

(4) For purposes of Subparagraphs (a) and (b) hereof, rental shall not be imposed for passage of a commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership as upon the next preceding passage over said State land for which rental has accrued. Commodities which are not identical to crude oil include, but are not limited to fuel oil, diesel oils, gasoline, petrochemicals, and middle distillates.

(5) Annual rentals, based on the number of barrels of crude oil and products and derivatives thereof passing over the State's land shall not accrue on petroleum products used solely to test, heat, purge, flush or maintain the pipelines located on the leased lands."

3. Lessee shall, with each rental payment, furnish Lessor with a full and complete statement in a form satisfactory to Lessor, signed and certified, specifying the nature, quantity, origin/destination and ownership of commodities received or shipped across the State's land. Lessee shall maintain for audit of such statements and shall furnish on thirty (30) days written notice, source documents for such statements such as cargo manifests, invoices, bills of lading, ship tickets, and/or other pertinent documents, sufficient to deter-

mine the nature, quantity, origin/destination and ownership of commodities received or shipped. Such source documents shall be maintained for a period of at least five (5) years after their preparation.

4. (a) Lessee agrees to pay the annual rental stated in Paragraph 3 hereof to Lessor without deduction, delay or offset, at such place as may be designated by Lessor from time to time, in advance, on, or prior to the beginning date of this lease renewal and each anniversary of such beginning date during each year of the term hereof.

(b) Lessor may, effective on the fifth anniversary of the beginning date of this renewal period (January 1, 1980) and each subsequent fifth anniversary of the said beginning date, elect to change the amount of rental to be paid by Lessee hereunder. Such change in annual rental shall conform to the requirements of 2 Cal. Adm. Code, Article 2. Such change in annual rental shall not become effective unless Lessor gives Lessee written notice of such change on or before sixty (60) days before the effective date of such change. Should Lessor fail to effect a change of such annual rental effective on any such fifth anniversary of said beginning date, the annual rental shall remain the same as the rental payable for each year during the immediately preceding five-year period; provided, however that for any years remaining before the next five-year anniversary of said beginning date, Lessor, on written notice of not less than sixty (60) days before the next annual rent becomes due, may fix a different annual rental, which annual rental shall be determined in the manner hereinbefore set forth, which annual rental shall be payable each year thereafter by Lessee unless thereafter changed in the manner herein provided. Any change in the annual rental effective on a date other than any fifth anniversary of said beginning date, shall be without prejudice to Lessor's right

to change said annual rental on each succeeding fifth anniversary of beginning date as above provided. It is specifically agreed that in the event of the termination of this lease prior to its expiration date from any cause whatsoever, no portion of rental paid in advance shall be refundable.

(c) In the event that the parties to this lease are unable to agree upon a firm annual rental at the expiration of the lease renewal period agreed herein, and the Lessee remains in possession of the leased lands and continues to pay an interim rental until a firm new rental is agreed upon by the parties, then at such time when the Lessee submits payment for any or all retroactive amounts, the State shall collect interest on said retroactive payments at the rate specified in Public Resources Code Section 6224. This shall not be construed as a limitation upon any other remedy which the State may have against a holdover Lessee.

(d) It is agreed by the parties hereto that any installments of rental accruing under the provisions of this lease that shall not be paid when due shall bear interest at the specified rate from the date when the same was payable by the terms hereof, as provided in Public Resources Code Section 6224 until the same shall be paid by the Lessee.

(e) The failure to pay the rentals specified in this lease shall subject the Lessee to a ten (10) percent penalty on the accrued and unpaid balances for the rental payable after January 1, 1976.

5. Paragraphs 9 and 13 of said Lease PRC 3454.1 are hereby deleted and the following substituted therefor:

"9. Indemnity, Bond and Insurance: (a) Lessee shall indemnify, save harmless and at the option of the State, defend, the State of California, its officers, agents and employees against any and all claims,

demands, loss, action or liability of any kind which the State of California, or any of its officers, agents or employees may sustain or incur which may be imposed upon them or any of them arising out of or connected with the issuance of this lease including, without in any way limiting the generality of the foregoing, any claim, demand, loss or liability arising from any failure of title or any alleged violation of the property or contractual rights of any third person or persons in the leased lands.

(b) Lessee shall file with Lessor and maintain in full force and effect at all times during the term of this lease or any extension thereof, and an additional period of one hundred (120) days or until the State has accepted a quitclaim deed and sufficient evidences of removal of improvements requested to be removed, whichever is longer, a good and sufficient surety bond drawn in favor of the State of California in the sum of $50,000.00, to guarantee the Lessor the faithful performance and observance by the Lessee of all of the covenants and conditions implied or specified in this lease, and which specified or implied covenants and conditions are mandatory upon and are to be kept and performed by the Lessee.

(c) Lessee shall obtain at his own expense and keep in full force and effect during the term of this lease for the protection of Lessee and the State, in an insurance company acceptable to Lessor, comprehensive public liability insurance covering the leased premises and their surrounding area with limits of not less than $1,000,000 for bodily injury and $5,000,000 for property damage. The policy or policies shall specifically name the State as an insured party as to the land under lease; and the policy or policies shall specifically identify the lease by number, and a certificate or certificates of insurance must be provided by the Lessee to Lessor.

(d) Lessee agrees that the liability insurance coverage herein provided for shall be in effect at all times during the term of this lease, and until said leased land is restored as nearly as possible to condition existing prior to erection or placement of the improvements thereupon or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved with structures, buildings, pipelines, machinery, facilities and fills in place. If Lessor elects to accept only a portion of the leased land as then improved, lessee's responsibility to insure the premises shall terminate as to those portions that the Lessor accepts intact, but shall continue in the remaining portions until said portions are restored as nearly as possible to the conditions existing prior to the erection or placement of improvements thereupon. In the event said insurance coverage expires at any time or times during the terms of this lease, Lessee agrees to provide, at least fifteen (15) days prior to said expiration date, a new certificate of insurance evidencing insurance coverage as provided for herein for a period of not less than one (1) year, or for not less than the remainder of this lease, and until the leased land is restored or until Lessor, in writing, elects to accept the leased land or any portion thereof as then improved as provided for herein. New certificates of insurance are subject to the approval of the Lessor and Lessee agrees that no construction, improvements, additions, work or service shall be performed prior to the giving of such approval. In the event Lessee fails to keep in effect at all times insurance coverage as herein provided, Lessor, may, in addition to any other remedies it may have, terminate this lease upon the occurrence of such event.

6. Paragraph 6 of said Lease PRC 3454.1 is hereby deleted and the following substituted therefor:

"6. Assignment, Transfer or Subletting: (a) Lessee shall not either voluntarily, or by operation of law, assign, transfer, mortgage, pledge, hypothecate or encumber this lease or any interest therein, and shall not sublet the said premises or any part thereof, or any right or privilege appurtenant thereto, or allow any other person (the employees, agents, servants and invitees of Lessees expected) to occupy or use the said premises, or any portion thereof, without the prior written approval and consent of the Commission. A consent to one assignment subletting, occupation or use by any other person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation or use by another person. Consent to any such assignment or subletting shall in no way relieve lessee of any liability under this lease and shall be subject to any and all conditions required by the Commission, including, without limitation by reason of specification herein, the altering, changing or amending of this lease as deemed by the Commission to be in the best interests of the State. Any such assignment or subletting without such consent shall be void, and shall, at the option of the Commission constitute a default under the terms of this lease.

(b) The leasehold interest hereby described is created as an appurtenance to littoral land. The leasehold interest is not severable from the rights and interests of the Lessee in the littoral land without the express written approval of the State Lands Commission first had and obtained. Any such severance without State Lands Commission approval shall be grounds for termination of the lease by the State Lands Commission."

7. Oil Spill Emergency: In the event of a spill or leak of oil or other liquid pollutant into waters over State lands of less than 10 barrels, Lessee shall immediately notify the State Office of Emergency Services

via the toll-free 24-hour service telephone number 1-800-852-7550. For spill of 10 barrels or more, Lessee shall report directly to the State Lands Commission 24-hour service telephone number (213) 590-5201. Information to be reported shall include, but not be limited to:

The name and company of the person reporting, an information telephone number that can be contacted for further information, the time and date of spill, the location of the spill, the waterbody affected, source of spill, the discharger, the substance spilled, the estimated quantity spilled, the cause of the spill and action taken.

8. Marine Terminal/Wharf Operations: Lessee shall provide Lessor with an approved Oil Spill Contingency Plan/Spill Prevention Control and Countermeasure Plan and a Terminal Operations Manual in the form required by Federal and State Regulations and guidelines. Lessee shall periodically review such plans and advise Lessor of any changes to such plans.

9. Repossession: In the event of failure of Lessee to pay rental, or in the event of a breach of any other of the other covenants contained within the lease, or failure of Lessee to observe the terms, conditions, restrictions or time limitations herein contained, to be kept, performed and observed, it shall be lawful for Lessor to re-enter into and upon the demised premises, and to remove all persons and property therefrom, and to repossess and enjoy the demised premises as in the first and former estate of the State; provided, however, that Lessor shall first give Lessee written notice of such default and Lessee shall have 30 days after receipt of such notice to cure such default or, if such default cannot reasonably be cured within such 30-day period, to commence curing such default within such 30-day period period and to diligently pursue to conclusion the actions necessary to cure such default,

and, so long as such default is cured within the prescribed time limits, to the satisfaction of Lessor, Lessor shall not repossess the demised premises as provided herein.

10. Paragraph 10 of said Lease PRC 3454.1 is hereby deleted and the following substituted therefor:

"10. Rules and Regulations: (a) Lessee shall observe and comply with all rules and regulations now or hereafter promulgated by any governmental agency having authority by law.

(b) Lessee recognizes and understands in accepting this lease that his interest therein may be be subject to a possible Possessory Interest Tax that the city or county may impose on such interest, and that such tax payment shall not reduce any rent due the Lessor hereunder and any such tax shall be the liability of and be paid by the Lessee.

(c) Lessee covenants that all reasonable precautions will be taken to prevent pollution and contamination of the environment. Unabated pollution and contamination of the environment shall be grounds for termination of this lease."

11. Reservation of Rights: Lessor acknowledges that Lessee considers to be invalid the regulations of Lessor which provide for the type of volumetric rental set forth in Paragraph 3 hereof, and that Lessee is one of the plaintiffs in two lawsuits seeking a declaration that said regulations are invalid and beyond Lessor's statutory authority. By entering into this agreement, Lessee does not waive any rights it may have to contest the validity of said regulations in the pending litigation, and Lessee hereby reserves any such rights. Pending final disposition of said lawsuits, being Western Oil and Gas Association, et al. v. Cory, et al., U.S.D.C. (E.D. Cal.), No. Civ S-76-513 and Western Oil and Gas Association, et al. v. California State Lands Com-

mission, Sacramento Superior Court. No. 267822, Lessor will deposit the volumetric rental monies accruing hereunder in excess of minimum annual rental as set forth in Paragraph 2(a) and 2(b)(3) hereof, in an interest-bearing special deposit account in the State Treasury. If it is finally determined in either of said lawsuits that Lessor does not have the right to charge rentals for industrial leases based on the volume of commodities passing over the State's land, Lessor will return to Lessee, subject to applicable provisions of law, all accumulated principal and any interest actually earned thereon in the special deposit account. Notwithstanding the foregoing, in no event shall Lessor be required to refund to Lessee any portion of the minimum annual rental specified in Paragraph 2(a) and 2(b)(3) hereof. In the event that a refund is made to Lessee pursuant to the terms of this paragraph, it is mutually understood and agreed that Lessor is empowered to impose a new reasonable rental retroactive to the beginning date of this lease.

All other terms and conditions of Lease PRC 3454.1 shall remain in full force and effect.

The effective date of this Agreement shall be and is July 26, 1979. This Agreement will become binding on the Lessor only when duly executed on behalf of the State Lands Commission of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date hereafter affixed.

[Dated December 20, 1979]

[Subscriptions, acknowledgment and certificate omitted in printing]

[Remainder of Exhibit 3 omitted in printing]

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Jan. 5, 1981]

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To Plaintiffs and their Attorneys:

Please take notice that on February 2, 1981, at 10:00 a.m., or as soon thereafter as the matter can be heard, in the courtroom of the Honorable Philip C. Wilkins, United States District Judge, 650 Capitol Mall, Sacramento, California, defendants will move the court for entry of summary judgment against plaintiffs on each of their three claims.

Said motion is made upon the grounds that:

1. As to the Second Claim (Pendent Jurisdiction), this claim has been finally resolved against plaintiffs in the California state courts, and is therefore barred by res judicata.

2. As to the First Claim and Third Claim, there is no issue of material fact as to these claims, and defendants are therefore entitled to judgment as a matter of law.

Said motion is based upon this Notice of Motion and Motion, the brief filed herewith, the supporting declarations attached thereto, and upon all other pleadings, documents, and papers on file in this action.

Dated: January 5, 1981

George Deukmejian
Attorney General
N. Gregory Taylor
Assistant Attorney General

/s/ Dennis M. Eagan
Deputy Attorney General

Attorneys for Defendants

[Affidavit of service by mail omitted in printing]

AFFIDAVIT OF GARY R. HORN (EXHIBIT B TO DEFENDANTS' OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED JAN. 5, 1981 IN DISTRICT COURT)

State of California
County of Sacramento ss.

Gary R. Horn, being first duly sworn, deposes and says:

I am a land agent on the staff of the California State Lands Commission. My duties as a land agent in part consist in the negotiation of ground leases of State-owned land with private parties and the presentation of such leases to the State Lands Commission for approval. I perform appraisals in connection with these leasing activities. I am familiar with the types of State land leased by the Commission, the types of leases entered into, and the manner in which the rent to be charged for such leases is determined.

Certain classes of land are administered on behalf of the State of California by the State Lands Commission. Among them are tide and submerged lands, the beds of navigable lakes and rivers, school lands obtained by grant from the federal government, lands obtained by grant from the federal government in lieu of school lands ("lieu lands"), and swamp and overflowed lands obtained by grant from the federal government. All of these classes of lands are subject to issuance of ground leases by the State Lands Commission.

Leases issued by the State Lands Commission are classified according to the purpose of the lease. Among these lease classifications are industrial leases, right of way leases, and commercial leases. The industrial lease classification includes ground leases for marine terminal sites. The State leases referred to in the declarations filed with the Court in support of plaintiffs' renewed motion for summary judgment are marine terminal leases for the placement of piers, wharves, and appurtenant structures

upon state land. These leases give the lessee the right, for payment of rental, to appropriate to its exclusive use for a term of years discrete parcels of State-owned land.

The State Lands Commission employs various rental formats in the leases which it issues. One format used by the Commission is a flat yearly rent determined by applying a capitalization rate to the fee simple fair market value. For example, a parcel of State land having a fair market value of $500,000 might have applied to it a capitalization rate of 8 per cent, yielding an annual rent of $40,000. Other lease formats are also used. For pipeline right of way leases, as an alternative to the rental format just discussed, the Commission has charged a rental per annum of so many cents per diameter inch per lineal foot. For example, a pipeline 10 inches in diameter and 10,000 feet in length charged for at the current rate of 1½ cents per diameter inch per lineal foot would yield an annual rent of $1,500. The Commission also has issued "percentage" leases for commercial activities such as restaurants, marinas, and retail shops. In these leases, the minimum rent is determined by applying a capitalization rate against the appraised fee simple fair market value, and the Commission reserves as rent a stated percentage of the income derived from the business conducted upon the State land which is the subject of the ground lease. The flat minimum rent is applied against the rent due under the percentage of income provision of the lease. For example, with a parcel of State land having a fair market value of $100,000 and using a capitalization rate of 8 per cent, a minimum annual rent of $8,000 would be derived. An annual rent of 5 per cent of income might be provided for in the lease. With an income of $500,000, such a lease would yield $25,000. Minimum rent is paid in advance. In this example, the lessee would thus pay an additional $17,000 in rent during the course of, or at the end of, the lease year, having already been credited with the minimum rent payment of $8,000.

All of the above rental formats were in use by the Commission prior to 1976.

By amendments to its regulations adopted in 1976, the State Lands Commission authorized a variant of the percentage lease format to be used in determining rent for industrial and right of way leases, including leases for marine terminal sites. Under this latter format, rent may be charged based upon the volume of commodities passing over the leased State land. This is referred to as volumetric rental. For example, with a marine petroleum terminal site having a fair market value of $500,000 and using a capitalization rate of 8 per cent, a minimum annual rent of $40,000 would be derived. The volumetric rent might be 1 cent per barrel of oil until the minimum rent is reached, 1 mil ($.001) per barrel for the next 7 million barrels, 3 mils ($.003) per barrel for the next 20 million barrels and 6 mils ($.006) for each barrel thereafter. Assuming an annual volume of 25,000,000 barrels of oil passing over the leased land, the annual rent would be $89,000 ($.01 x 4 million bbls. = $40,000; $.001 x 7 million bbls = $7,000; $.003 x 14 million bbls. = $42,000; $40,000 plus $7,000 plus $42,000 = $89,000). The flat minimum rent of $40,000 would be paid at the start of the lease year and credited against volumetric rent due under the lease.

All of these various rental formats, including volumetric rental, are applicable alike to all varieties of land administered by the Commission, not just tide and submerged land; and all of the formats, including volumetric rental, are applicable alike to all lessees, regardless of whether they are engaged in intrastate, interstate, or foreign commerce. Neither are volumetric rentals applicable solely to petroleum and petroleum products; such rates apply to "commodities" generally. The Commission has several volumetric leases, for instance, pertaining to wharves for onloading and offloading sand and gravel.

I participated in the staff study of volumetric rentals conducted by the State Lands Commission, was present at the various public hearings concerning such rentals conducted by or on behalf of the State Lands Commission, and participated in meetings with representatives of the public utilities, common carrier pipelines, and the oil companies (including various of the plaintiffs in this lawsuit) concerning such rentals. These hearings and meetings resulted in various changes to the volumetric rental regulations initially proposed for Commission adoption in May 1975. I was present at the hearing before the State Lands Commission on April 28, 1976, at the conclusion of which the Commission adopted amendments to sections 2006 and 2007 of Title 2 of the California Administrative Code (now sections 2005 and 2006). These amendments provided guidelines for implementation of volumetric rentals for industrial and right of way leases. At this hearing, the staff introduced into the record of the proceedings, in support of its recommendation that the amendments be adopted, a report setting forth various factual and legal determinations in support of its recommendation. A true and correct copy of that report, entitled "Report of the State Lands Division on Volumetric Rental Rates Presented at State Lands Commission Meeting April 28, 1976," is attached as Exhibit 1 to this affidavit.

The State Lands Commission has to date approved volumetric rent for numerous marine terminal sites. I am participating in negotiations with certain other marine terminal lessees in which volumetric rent has been proposed by the Commission staff. The determination of the rent to be charged for such leases has proceeded, and I contemplate that it will proceed in the future, in the following manner:

1. A proposed annual minimum rent will be developed by the staff by appraising the fee simple fair market value of the leased land and applying a capitalization rate. The

figure thus arrived at has been, and will be, subject to negotiation with the lessee. This figure is particularly subject to negotiation because of the difficulty in appraising the fee simple fair market value of tide and submerged lands. Since 1909, section 7991 of the California Public Resources Code has banned sales of tidelands. A valuation approach based upon sales of comparable property must accordingly be abandoned in favor of less precise methods of valuation.

2. A proposed volumetric rent will be developed by the staff by considering similar charges being received by other public and private lessors for similar land, subject to adjustments in amount that may be indicated by the particular nature of the State land being leased, and by considering the criteria set forth in sections 2005(h) and 2006 of the Commission's regulations, including the actual and potential environmental damage inhering in the lessee's use of the land, and the extent to which such damage is quantifiable, as provided by section 2005(h)(2) of the Commission's regulations. Where appropriate, and based upon considerations such as efficient use of the State's land and the probability that a particular commodity, such as oil, may cause environmental damage if an accident occurs, a variable volumetric rate will be developed, with changes in rates occurring at various volume levels. The elements of the volumetric rent thus arrived at have been, and will be, subject to negotiation with the lessee.

3. The minimum rent in any lease so negotiated is a credit against the volumetric rent due under the lease. The volumetric rent is not a separate charge "over and above" the minimum rent, as may be implied in some of the declarations filed in support of plaintiffs' motion.

Volumetric rentals have been negotiated regarding marine terminal sites in the following situations: (a) where a lease rental is being negotiated for the first time; (b)

where a new lease rental is being negotiated in connection with a lease renewal; (c) where a revised rent is being negotiated pursuant to a five-year rent review provision contained in some leases; and where the lessee has asked for a lease amendment to change certain terms of the lease, such as the area leased. In no case has a volumetric rental been negotiated solely as consideration for the Commission approving an assignment of a lease. The Supplemental Declaration of Kenneth T. Palmer (¶ 5) and the Affidavit of Clinton B. Fawcett (¶¶ 4, 5), both submitted with plaintiffs' renewed motion for summary judgment, are inaccurate when they state that the volumetric rental negotiated for Lease PRC 3414.1 was agreed to as consideration for the approval by the Commission of the assignment of said lease from Gulf Oil Corporation to Pacific Refining Company. As appears from paragraph 2 of the lease executed by the Commission with Pacific's predecessor in 1965 (Exh. A to the Affidavit of Kenneth T. Palmer, which affidavit is attached as Exh. 1 to the Supplemental Declaration of Kenneth T. Palmer), no firm rental was negotiated when the property was first leased by the Commission. Such a firm rental still had not been negotiated by the time of the proposed assignment to Pacific in 1976. A firm rental was negotiated contemporaneously with the assignment and took the form of an amendment to the lease. Both the consent to assignment and the amendment, providing for the firm rental, are attached as Exhibits C and D to the Affidavit of Clinton B. Fawcett, which affidavit is attached as Exhibit 2 to the Supplemental Declaration of Mr. Palmer.

The volumetric rates negotiated by Commission staff with marine terminal lessees are considerably below similar charges by other public and private lessors. For instance, the Port of Los Angeles currently charges 3.6 cents per barrel wharfage for oil transferred between a vessel and a storage area through a private pipeline and 7.2 cents per

barrel for petroleum products transferred to a vessel from a barge where the vessel was not loaded at the Port of Los Angeles.

I participated in the negotiations that led to agreement on volumetric rentals for each of the leases mentioned in the declarations filed with plaintiffs' renewed motion for summary judgment. In no sense were the minimum rent or the volumetric rent for those leases unilaterally imposed by the State Lands Commission or its staff. The minimum rent and the volumetric rent were negotiated and compromised with each lessee in the following respects:

1. The volumetric rates initially proposed by the Commission staff were in each case reduced after negotiation, with the result that total rent under the leases was decreased.

2. The volume levels initially proposed by the Commission staff at which different volumetric rates would become operative were in each case altered after negotion, with the result that total rent under the leases was decreased.

3. The fee simple fair market value for the leased property initially proposed by the Commission staff was in each case reduced after negotiation, thus resulting in a lower minimum rent in each instance. For each of said leases, the negotiated reductions in fee simple fair market value were as follows:

Lease	Value Appraised by SLC	Value Agreed Upon
1. PRC 600.1 (Union)	$ 658,000	$ 512,500
2. PRC 236.1 (Chevron)	$1,437,480	$1,293,000
3. PRC 3453.1 (Tosco)	$ 700,000	$ 525,000
4. PRC 3454.1 (Tosco)	$ 417,000	$ 375,000
5. PRC 4908.1 (Shell)	$ 755,000	$ 750,000
6. PRC 3414.1 (Pacific Refining)	$ 560,000	$ 406,250

The negotiations with reference to the volumetric rentals for each of the above-referenced leases involved concessions on both sides and resulted in mutually agreed-upon rentals considerably lower than those originally proposed by Commission staff. In none of these instances did negotiations break off and the lessee seek a court determination that the rental proposed by Commission staff was unreasonable and thus inconsistent with the terms of the applicable lease pursuant to which the rental renegotiations took place.

/s/ Gary R. Horn

Subscribed and sworn to
before me this 31st day of
December, 1980.
/s/ Diane R. Jones

Notary Public in and for said County
and State

[Seal]

Exhibit 1

REPORT OF THE STATE LANDS DIVISION ON VOLUMETRIC RENTAL RATES PRESENTED AT STATE LANDS COMMISSION MEETING APRIL 28, 1976

INTRODUCTION

The matter of volumetric rental rates has been pending before the State Lands Commission for approximately one year. Although the concept of such a rental option was approved by the Commission at the May, 1975 meeting, the specific guidelines for its implementation have been the subject of extensive inquiry in the last year. The purpose of this report is to summarize the results of that inquiry and to explain the basis for the staff's recommendation that the proposed regulations, as revised, be adopted by the Commission.

I. SUMMARY OF PROCEEDINGS

A. Chronology

In mid 1974, the Division began a review of leasing regulations with the purpose of recommending appropriate revisions to the Commission. Hearings were conducted in Sacramento on April 29, 1975 and in Long Beach on May 2, 1975. The staff recommendation, including volumetric rental charges, was presented to the Commission at its May, 1975 meeting. The oil and gas companies, the utility companies, the common carrier pipelines, and the Western Oil and Gas Association strongly protested the volumetric rental schedules.

The Commission deferred action on the volumetric rental schedules and directed the staff to hold additional public hearings on the matter. During June, 1975 all organizations which would be affected by volumetric rental schedules

were canvassed by letter inviting comments or suggestions. In addition staff meetings were held with public utilities on July 22, 1975; common carriers on July 23, 1975; and the oil industry on July 31, 1975. Summaries of all these events are contained in work order W 5125.8.

After the informal meeting in the summer of 1975, staff continued working closely wtih the Office of the Attorney General to determine the appropriateness of the volumetric charges initially proposed. To that end, the Attorney General retained a valuation consultant familiar with special use property appraisals. Division staff and the consultant continued to investigate the leasing practices of the major California ports; examined numerous right of way leases issued by public and private entities; and generally conducted a search of data relating to the leasing of similar lands.

As a result of this extended inquiry, the staff has proposed certain alterations in the regulations initially proposed in May, 1975. The staff held another hearing on the latest version of these proposed regulations in Sacramento on April 21, 1976.

B. Substance of Comments Received and Information Developed

Some of the points brought out by those directly affected by the initially proposed volumetric charges at the April and May 1975 hearings and the summer 1975 informal meetings included: (1) that the initially proposed schedule would result in a rental rate being charged several times on the same product; (2) that there was a potential for cumulative effect if the State adopted a rental based on a volumetric charge. Other land owners might well charge on the same volumetric basis, with the result being prohibitively-high transportation costs; and (3) that there was no precedent for imposition of a volumetric charge; and

(4) that the proposed fixed rental schedules would result in arbitrary, discriminatory and unjustifiable rentals being imposed by the Commission.

There were a number of legal arguments advanced in opposition to the regulations proposed for adoption last year. They were: (1) that section 6503 of the Public Resource Code requires that lease rentals be based upon the appraised value of the land, and the proposed charges based upon the volume of commodities passing over State land had no basis in commonly-accepted appraisal practices; (2) that the proposed changes in rental charges required the preparation of an environmental impact report under the California Environmental Quality Act (CEQA), and no EIR had been prepared; (3) that the proposed charge constituted both a tax on imports and a duty on tonnage, and was, therefore, invalid under the provisions of the United States Constitution; and (4) that the proposed charge constituted an unreasonable burden upon interstate commerce in violation of the United States Constitution.

Some of these same factual and legal arguments were presented at the April 21, 1976 hearing. In addition, it was argued that the omission of a fixed schedule from the revised proposed regulations was too vague, and did not permit those affected to calculate in advance the rental that might be asked by the Commission for an industrial or right of way lease on a particular parcel of State land.

Among the important conclusions derived from the inquiry conducted in the last year is that a rental charge for the use of unimproved land based directly or indirectly upon the volume of commodities passing over such land is not a new or novel concept. All of the following situations involve such a volumetric charge:

(1) Private landowners frequently charge for logging road rights of way based upon the board-feet of logs

transported over the road. The responsibility for road construction and maintenance is generally the responsibility of the timber company, not the landowner.

(2) There is evidence that a per-ton "throughput" charge has been imposed for use of rights of way across private land for the transportation of coal.

(3) The City of Seal Beach, in return for a franchise to use city streets and public places for oil pipelines, charges Exxon two percent of the royalty paid to the State on the offshore oil and gas lease which the pipelines serve.

(4) A private lease originally entered into by the Hollister Estate Company, in return for the use of pipeline rights of way, charges two percent of the royalty paid to the State on the offshore oil and gas lease located nearby. The revenue under both the franchise and the private lease varies indirectly with volume.

(5) A portion of the wharfage charge imposed by ports for the offloading of cargo on port land represents a "throughput" charge for the use of unimproved land.

(6) Similarly, it appears that a portion of the throughput charges imposed by pipeline operators for the use of their pipelines necessarily goes to recover, and to obtain a return upon, right of way costs.

(7) Franchises granted by public agencies under the Broughton Act and the Franchise Act of 1937 for the laying of transmission lines and pipelines of various types are often charged for based upon a percentage of gross receipts.

This franchise fee is, in effect, a rental which can vary according to the amount of the product or commodity put through the transmission facilities which are the subject of the franchise.

(8) Percentage leases are another form of variable rental lease where the amount of the rental is influenced by volume—in this case the volume of goods sold.

II. ANALYSIS

Each of the factual and legal arguments raised in opposition to the revision in rental charges proposed last year has been given careful review. In addition, the staff and the Attorney General, with the aid of a consultant, have conducted their own expanded inquiry into the factual and legal matters bearing on the validity of a volumetric rental charge. Many of the criticisms raised at the formal hearings and the subsequent informal meetings with affected groups have resulted in revision of the amended regulations originally proposed for adoption. Certain other factual and legal arguments were found to be without merit.

In summary, the revised proposal for amendment of the Commission's leasing regulations is based upon the following staff determinations: (1) that a land rental varying with the volume of commodities passing over unimproved land has been employed by other lessors in similar situations; (2) that such a volumetric rental, if otherwise reasonable under all the circumstances, may be employed as one of the alternative rental bases used by the Commission; and (3) that instead of adopting an inflexible schedule of volumetric rental rates uniformly applicable to widely varying factual situations it is preferable to approve the volumetric rental concept merely as one of several alternative rental options available for use by the Commission, at the same time providing the Commission with a set of criteria for its guidance in applying this rental concept.

The Commission has authority under section 6503 of the Public Resources Code to adopt such a volumetric rental charge. The requirement of an appraisal in section 6503 does not mean that the rental must be derived from a conventional appraisal; nor does it mean that the Com-

mission is limited to charging as rent an annual percentage of appraised value. The section provides that: "the Commission shall appraise the lands and fix the annual rate or other consideration therefor . . .". The Commission has interpreted this language broadly to permit percentage leases as well as pipeline right of way leases charged for on the basis of diameter and length of the pipeline.

The staff has overcome some of the criticisms of the regulations initially proposed in this recommended revision. Regarding the problem of a single pipeline crossing several different parcels of State land, a volumetric charge will not be imposed for each passage over State land; rather, the charge will be apportioned in the proportion that the length of pipeline over State land bears to the total length of the pipeline. (See proposed section 2007 (b)(2)). Any precedent established by a volumetric rental charge will therefore include the concept of apportionment.

Similarly, the staff's recommendation specifically responds to the problem of double charging for the same commodity upon its repassage over State land. (See proposed section 2007(b)(1)).

The staff does not agree that the absence of a specific and inflexible schedule makes the proposed regulations unreasonably vague. Many of the rental options set forth in the existing regulations do not permit calculation by a prospective lessee of the rental which he will have to pay for a given lease. With a rental based on eight percent per year of appraised value, appraisals can vary widely, particularly with tide and submerged land, for which there is no definitive market data. The companies who are protesting the alleged "vagueness" of these rental regulations know quite well that the same flexibility is inherent in the existing means of determining a rental rate on, for instance, a marine terminal site. Case by case negotiations

have worked well in this admittedly difficult area of marine terminal site appraisals, and we see no reason why a similar approach, governed by specific guidelines and limitations, should not work well in negotiating volumetric rentals. This approach is no different than that used by the ports: each lease is subject to negotiation; there is no uniformly applicable set of rates or lease provisions which are used by the ports in negotiating individual leases.

The arguments questioning the constitutionality of the proposed regulations may be distilled down to this: the Commission may not exact an unreasonable charge for the use of State lands from those engaged in interstate commerce. The arguments that volumetric rentals for the use of Sate land would constitute "taxes" or "duties on tonnage" we find to be without merit. Regarding reasonableness, there is nothing per se unreasonable about such a volumetric rental charge. As indicated, it is not a novel concept. Specific rates, of course, might be unreasonable, but specific rates have been left to future negotiations between particular lessees and the State, where a wide range of factors can be taken into consideration to insure that a volumetric rate, if imposed, is particularly suited to the situation at hand, and hence reasonable. One of the potential vices of the initial regulations considered by the Commission was the inflexibility of the rate schedule. Under that schedule, the same rate might be applied to situations where land value or potential environmental impact varied widely. The staff has concluded that this is an undesirable result and that lease by lease negotiation, as is now employed with marine terminal sites, is the preferable approach.

Regarding the argument that preparation of an environmental impact report is a necessary preconditon to Commission action on the proposed regulations, the staff feels that removal of a specific rate schedule removes the basis for any possible contention that an EIR is required. Ap-

proval of a volumetric rental concept in the abstract generates no significant environmental effect. Indeed, the general concept of a volumetric rental charge has been part of the Commission's regulations since June 1975 and has gone unchallenged on environmental grounds. Further, one of the guidelines for Commission selection among rental alternative and rates is whether a particular rental would compel use of substitute facilities by prospective lessee. If, at some time in the future, the Commission should insist upon a rental rate that might compel selection of a substitute facility by the prospective lessee, that would be the appropriate time for the assessment of the environmental impact of the proposed rental rate. At this point, it is meaningless to speculate about environmental impacts that may never occur. If they should occur, they will not occur as a result of Commission action in adopting these regulations, which do nothing more than adopt guidelines for a rental option already approved in principle by the Commission in its regulations.

A brief word is appropriate regarding prior staff evaluations of a volumetric rental concept. In January 1974, the Auditor General issued a report critical of the Commission's leasing practices for marine terminals, concluding that the Commission's appraisals for these sites were arbitrary, and recommending that a minimum charge of one cent per barrel be imposed for those terminal sites used for the transfer of petroleum and related products between ship and shore. The Auditor General's proposal did not encompass right of way leases or industrial leases generally. In response to this report, the Commission in April 1974 evaluated the Auditor General's criticism and recommendation and determined that the criticism was unfounded and that the recommendation should not be adopted. The more recent and extensive inquiry conducted by the staff and by a consultant retained by the Attorney General has confirmed that much of the staff's criticism of the Auditor

General's report was well-taken. However, the recent inquiry has also demonstrated that some of the factual bases for the staff's criticism of the recommendation were inaccurate. Finally, many of the staff's concerns at that time have been obviated in the amended regulations now proposed for adoption by the Commission.

The staff remains critical of the Auditor General's recommendation of a minimum volumetric charge limited to marine petroleum terminal leases which would in all cases exceed that charged by ports for the following reasons: the Commission limitation of such a charge to one type of industrial lease could expose the Commission to charges of discrimination in its leasing practices; it cannot be said that petroleum marine terminal sites offered by the State are without exception superior to those offered by ports, thereby warranting a uniformly higher rental; and from a pure appraisal standpoint, it would be difficult to justify a minimum one cent per barrel charge that applied to every lease, regardless of the individual factors that might pertain to a particular lease. The proposed amendment to the regulations deals with these past staff criticisms by expanding the applicability of a volumetric rental concept to include all industrial leases, as well as right of way leases.

On the other hand, some of the staff's past factual premises in criticizing the Auditor General's recommendation have been revealed as inaccurate by the recent inquiry of the staff and the Attorney General's consultant. For instance, it is not true that the volumetric charges imposed by ports are limited solely to a recovery of the cost of improvements, or that port facilities are always provided by the ports themselves, or that what the State offers its terminal lessees is uniformly of less value than what is offered by ports. On the contrary, it appears that an element of the "throughput" charge imposed by ports repre-

sents a recovery on unimproved land; that such charges are imposed after improvement costs have been recovered; and that, with the advent of supertankers, the deeper waters which the State can offer for offshore anchorage may in fact be superior in some instances to the shallower harbor facilities provided by the ports. In short, the practice of the ports *does* provide a "precedent", if one were needed, for charging rental for unimproved land based upon a volumetric principle, and there may indeed be instances where a higher volumetric charge by the State than that charged by a port would be justifiable.

Finally, the staff's earlier reservations regarding possible cumulation of charges on the same commodity have been disposed of by alteration of the regulations to avoid this potential.

III. CONCLUSION

In the staff's judgment, the proposed regulations, as revised, have a sound basis in fact and law. We recommend that they be adopted by the Commission.

AFFIDAVIT OF DENNIS M. EAGAN (EXHIBIT C TO DEFENDANTS' OPENING BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED JAN. 5, 1981 IN DISTRICT COURT)

State of California
City and County of
San Francisco
ss.

Dennis M. Eagan, being first duly sworn, deposes and says:

I am a Deputy Attorney General of the State of California and one of the attorneys representing the defendants in this action. I have been involved as an attorney in all phases of this action. I also represented the California State Lands Commission in all phases of the related state court litigation that arose as a result of this court's abstention order, being Western Oil & Gas Association, et al. v. California State Lands Commission, Sacramento Superior Court No. 267822, which is the subject of the appellate court decision in Western Oil & Gas Assn. v. State Lands Com- (1980) 105 Cal.App.3d 554.

A true and correct copy of the Amended and Supplemental Complaint filed by plaintiffs in said superior court action is attached hereto as Exhibit 1.

A true and correct copy of the Judgment entered in said superior court action is attached hereto as Exhibit 2.

/s/Dennis M. Eagan

Subscribed and sworn to before me
this 2nd day of January, 1981.
Ruth M. Cummings
Notary Public in and for said City
and County and State

[Seal]

Exhibit 1

Superior Court of the State of California
for the County of Sacramento
No. 267822

Western Oil and Gas Association,
Pacific Refining Company, Edgington Oil Company,
Atlantic Richfield Company, Exxon Corporation,
Getty Oil Company, Tosco Corporation, Shell Oil Company,
Chevron U.S.A. Inc. and Union Oil Company
of California, Plaintiffs,

vs.

California State Lands Commission, Defendant.

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiffs Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Tosco Corporation, (formerly Lion Oil Company), Shell Oil Company, Chevron U.S.A. Inc., and Union Oil Company of California by this verified, amended and supplemental Complaint allege as follows:

FIRST CAUSE OF ACTION
(Injunctive Relief)

1. Plaintiff Western Oil and Gas Association ("WOGA") is a corporation organized under the California non-profit corporation law. Its principal place of business is Los Angeles, California. Plaintiffs Chevron U.S.A. Inc., Edgington Oil Company and Union Oil Company of California are corporations duly organized under the laws of the State of California. Plaintiffs Exxon Corporation, Getty Oil Company, Pacific Refining Company, and Shell Oil Company are corporations duly organized under the laws of the State of Delaware. Plaintiff Atlantic Richfield Company is a corporation duly organized under the laws of the Common-

wealth of Pennsylvania. Plaintiff Tosco Corporation, formerly Lion Oil Company, is a corporation duly organized under the laws of the State of Nevada. All the foregoing companies are legally qualified to do and are doing business in the State of California.

2. Defendant State Lands Commission ("SLC") is a commission created by the laws of the State of California, and as such is authorized to sue and may be sued.

3. The principal office of the SLC is located in this County and all, or substantially all, of the acts complained of herein took place in this County.

4. The State of California, and its political subdivisions, hold, under grant from the United States under the Submerged Lands Act (43 U.S.C. 1311 and 1312), title to tidelands and submerged lands beneath the navigable waters of the United States from the Mexican border on the south, to the border of the State of Oregon on the north, and from its coastline to a point three geographical miles out to sea. In addition, the State of California holds title to submerged lands, beneath streams and other navigable waters, within the State.

5. The SLC has authority by statute to administer and control State tidelands and submerged lands, beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits. It may lease such lands as provided by law. Before such a lease may be entered or renewed it must be authorized by the SLC.

6. Those wishing to lease lands owned by the State must apply to the SLC for such a lease. Upon receipt of such an application to lease State lands the SLC is directed by § 6503 of the California Public Resources Code to "appraise the lands and fix the annual rental or other consideration therefor . . . ." Under this section the rental to be

charged for any particular lease must be based on the appraised value of the land leased.

7. California tide and submerged lands are used, *inter alia,* for wharves, at which tankers are moored, and for similar facilities over which petroleum, petroleum products and other commodities are transported by pipeline and otherwise, and for mooring facilities placed offshore and connected by pipeline and hose with tankers. Petroleum, petroleum products, and other commodities in intrastate, interstate and foreign commerce are transported by pipeline to and from said tankers and otherwise across such facilities and across, or under, state lands. California tide and submerged lands are also used for pipelines to and from petroleum producing platforms on state tide and submerged lands and in Federal areas beyond the three-mile limit on the outer Continental Shelf, which pipelines traverse California tide and submerged lands and are used for the transportation of oil and gas in interstate commerce.

8. California's tide and submerged lands, including those held by political subdivisions, are so located that it is virtually impossible (a) to transport petroleum or other products by ship or barge to or from other states or foreign countries and into or out of California without traversing such lands; (b) to transport oil and gas or other products by pipeline from state tide and submerged lands and from the outer Continental Shelf to the landward portions of the State of California without traversing such lands; and, (c) to engage in intrastate commerce by ship or barge from one portion of the State to another without traversing such lands and without utilizing wharves upon said property.

9. The SLC, in its capacity as administrator of California's tide and submerged lands, has made such lands available for the construction of wharves and similar

facilities, and pipelines, for use as is set forth under paragraph 7 above. The State provides no facilities or services under such leases but merely provides unimproved land. At all times, to and including at least the 28th day of April, 1976, it was the practice of the SLC, pursuant to its regulations, to make said lands available by lease, and to collect a rental for such leases based on a reasonable return on the appraised value of the land leased and on the amount of land occupied by any pipeline.

10. At its April 28, 1976, meeting the SLC amended its regulations to provide for the charging of "rentals" based not on the value of the land provided by the State but rather on the volume of commodities passing over State land. Such a "rental" is known as a throughput charge. A true and complete copy of said amendments is attached hereto as Exhibit "A" and incorporated herein by this reference.

11. The above-referenced regulations, in allowing for rentals on a throughput basis, are in excess of the authority of the SLC and as such are invalid under the laws of the State of California for the following reasons:

(a) Pursuant to such regulations the "rental" to be charged for the use of State lands is as follows: 8% of the fair market value of the leased land, as determined and agreed by both lessor and lessee, and an additional surcharge based upon the volume of commodities passing over the leased lands, which volume is in no way related to the value of such land, *i.e.*, neither the value of the land nor the burden imposed on the land is in any way changed by reason of differences in the volume of commodities passing over such lands via pipeline or otherwise; and,

(b) they contravene the provisions of the Tidelands Trust, which provides that the SLC is a public trustee of tide and submerged lands and in that capacity is

obligated to foster and not impede commerce. (*see, e.g., City of Long Beach v. Mansell,* 3 Cal.3d 462 (1971); *Colberg Inc. v. State of California,* 67 Cal.2d 408 (1967); *Higgins v. City of Santa Monica,* 62 Cal.2d 24 (1964); *Boone v. Kingsbury,* 206 Cal. 148 (1928); *Lane v. City of Redondo Beach,* 49 C.A.3d 251 (1975); *Martin v. Smith,* 184 C.A.2d 571 (1960);

12. The above referenced regulations, in allowing for rentals on a throughput basis, are unreasonable, arbitrary and capricious in the following respects:

(a) particularly for those leases of SLC-leased land contiguous to private land on which lessees have constructed improvements, they result in imposing exorbitantly high charges for the use of State lands, as compared to the value of that land, by trading on the virtual monopoly position occupied by the State over such lands;

(b) they inevitably lead to and have, in fact, resulted in annual rentals grossly disproportionate to the appraised value of the leased lands. In certain cases the leases provide for an annual charge of over 25% of the assessed value of the land;

(c) they allow for discriminatory and unequal treatment of lessees in that rentals charged on leases of substantially identical amounts of land in the same general location will be allowed to vary greatly depending on factors, i.e., the volume of commodities passing over such lands, which are in no way related to the value of that land or to services rendered by the State;

(d) they give the SLC the discretion to and the SLC has charged different rates of throughput for similar lands, which rates are unrelated to the value of the land or to services rendered by the state.

(e) they are totally unsupported by and are contrary to the evidence contained in the Administrative Record.

13. Such throughput charges bear no relationship to the value of services rendered or benefits foregone by the State and as such are further invalid under the Constitution of the United States, wherein it is provided that a State may not impose any of the following charges:

(a) Under Article I, Section 10, of the Constitution of the United States, the State may not impose, without the consent of Congress, any tax, duty, impost or other charge upon the importation of merchandise, including crude or refined petroleum, into the United States.

(b) Under Article I, Section 8, of the Constitution of the United States, California may not impose any undue burden upon foreign or interstate commerce.

(c) Under Article I, Section 10, of the Constitution of the United States, the State of California may not, without the consent of Congress, impose any duty of tonnage upon any vessel or cargo. A tonnage duty is a charge placed for the privilege of anchoring a vessel, or tying a vessel to a dock, or upon the value or amount of merchandise or commodities transported through, on or over California tide and submerged lands to the shore, if such charge is not based upon the value of facilities constructed by the state.

California has not received the requisite consent of Congress to impose any of the above-type charges. Plaintiffs herein presented these Constitutional questions, along with the state law questions raised herein, to the United States District Court for the Eastern District of California, case number CIV. S-76-513 PCW, in a complaint filed September 27, 1976. That Court, in response to a motion by defendants, exercised its discretionary power of absten-

tion and, by Order dated May 19, 1977, stayed further proceedings in that Court on the Constitutional issues raised pending a resolution of the state law issues raised herein by the State courts. By this action we do not ask this Court to rule on these Federal Constitutional questions and we specifically reserve those questions for the federal courts should a ruling thereon ever become necessary.

14. Pursuant to these regulations the SLC has demanded, and on information and belief will continue to demand, as leases come up for renewal, are made for the first time, or as lessees seek consent for modifications or assignments of leases, that such leases provide for "rentals" based not only on the appraised value of the unimproved land leased but, in addition, based on the volume of commodities passing over such lands.

15. The imposition of such throughput charges has resulted and will continue to result in charges for the use of State lands that far exceed a rental based upon the reasonable return on the value of that land.

16. Plaintiff WOGA's membership includes oil companies which perform in excess of 75% of the production, transportation, refining and marketing of crude petroleum in the Western United States and in California. Its members own and maintain crude petroleum, natural gas, and refined petroleum product pipelines located in the California tide and submerged lands which carry domestic and imported crude petroleum and refined petroleum products in intrastate and interstate commerce, wharves, anchorages and similar facilities at which tankers are moored and over which various commodities pass, all as described above. It is not possible for said oil companies to transport said commodities without utilizing said tide and submerged lands for the reason that, as aforesaid, said areas extend from the border of Mexico to the Oregon border. WOGA

brings this action on behalf of its members for the reason, *inter alia*, that a comprehensive determination of the validity of the system established by defendants is essential. WOGA has been duly authorized to bring this action.

17. (a) Plaintiff Pacific Refining Company ("Pacific") is the owner of a refinery, formerly owned by Sequoia Refining Corporation ("Sequoia") in 1976. Said refinery is served by facilities, at which vessels are moored and loaded and unloaded in interstate and foreign commerce, located on land under lease from the State of California. Said lease was originally issued to Sequoia and contained a clause forbidding assignment without the consent of the SLC. Defendant required Pacific to agree to a throughput charge based upon the amount of products going through said facilities as a condition to its consent to the assignment of the lease on said land. Pacific was compelled under protest to agree to such charges in order to be able to receive and ship cargoes without which it could not operate its refinery. The actual rental charges since the regulations were enacted have been as follows; 1976-1977: 89,284.47; 1977-1978: $93,806.02. Based on the SLC appraisal, the rate of return for the first two years has been 28% and 29% respectively. Pacific will pay over the 10-year life of the lease over 280% of the value of the land, which amounts vastly exceeds the reasonable rental value.

(b) Plaintiff Union Oil Company of California ("Union") holds leases administered by the SLC at various points in California, and will, in the ordinary course of business, continue to require such leases for importation of crude oil for use in its refineries, and for the transportation in interstate and foreign commerce of crude and refined petroleum. Amendments to a lease entered into in 1978 for wharf facilities serving Union's Contra Costa County refinery will require Union to pay rental charges of approximately $92,000 each year for the first five years of its lease and approximately $113,000 each year for the remaining five

years of its lease. This results in an annual net return on appraised value to the SLC of approximately 18% and 22% respectively, which amount far exceeds the reasonable rental value of the land under lease.

(c) Plaintiff Tosco Corporation ("Tosco") holds a lease administered by the SLC on which it has located wharf facilities used to transport coke and other commodities substantially all of which are in interstate and foreign commerce. In March of 1976 said lease was renewed for a 10-year period and amended to, among other things, fix an annual rental on said lease in the amount of $9,266.40. Said rental figure, as reflected in the Minutes of the SLC, was viewed by the SLC as the fair rental value of such property. Said renewal and amendment further provided, at the SLC's insistence, that the State could reset the rental on said lease at any time prior to February 28, 1977, to conform with any changes or additions to the SLC's rental regulations as might be promulgated. Pursuant to letter dated July 29, 1976, the SLC demanded a throughput charge on said lease in the amount of five (5) cents per ton of any and all bulk commodities passing over the wharf. Said letter further demands a minimum annual rental of $9,266.40. The effect of the throughput charge demanded by the SLC will, based on past experience, increase the rental on said lease in an amount two to three times that which the SLC has previously determined, only a few months prior to its July, 1976, letter, as the fair rental value on such property.

(d) Plaintiff Tosco also owns a refinery in Contra Costa County, California, which refinery Lion Oil Company acquired in 1976 from Phillips Petroleum Company ("Phillips"). (Lion merged with Tosco in February 1978.) Said refinery is served by facilities located on land under lease from the State of California, known as Amoco Wharf, at which vessels are moored and loaded and unloaded in interstate and foreign commerce. In May of 1977, said lease (also acquired from Phillips in 1976) was renewed for a

ten (10) year period and amended to, among other things, fix a minimum annual rental in the amount of $42,000.00. The annual rental negotiated in 1974 on this same lease was $14,544.14. Defendant required Tosco to agree, as a condition to its consent to said renewal and amendment, to a throughput charge based upon the amount of products going through said facilities. Tosco was compelled under protest to agree to such throughput charges in order to be able to receive and ship cargoes without which it could not operate its refinery. Under the new lease provisions Tosco will be required to pay approximately $66,000 each year for the first five years of the lease. The lease provides that the terms will be renegotiated for the remaining five years. This amounts to annual rent of about 12.5% of the appraised value of the land for the first five years alone.

(e) Plaintiff Chevron U.S.A. Inc. ("Chevron") holds a lease administered by the SLC adjoining property owned by Chevron and on which Chevron owns and operates a refinery. Chevron's refinery investment is in excess of 723 million dollars. It is indispensable that Chevron be able to use the SLC leased lands to run the refinery. On January 26, 1978 Chevron agreed to an extension of the SLC lease until August 18, 1987. Based on the state's appraised value of the leased premises, the SLC will receive an average annual net rate of return for each year of the extension in the amount of 21.5%, ranging from a low in 1978 of 17.275% to highs for 1984, 1985 and 1986 of over 24.18%. These rental charges constitute an unreasonable return to the State and are in excess of the normal and reasonable return for industrial land leases.

(f) In challenging the validity of the regulations as they have been applied by the SLC, plaintiffs place in issue only those leases specifically alleged in sub-parts (a)-(e) hereof and do not purport to raise issues concerning the reasonableness of specific rental rates for any lease not specifically covered by this amended and supplemental complaint.

18. Plaintiffs Atlantic Richfield Company, Edgington Oil Company, Exxon Corporation, Getty Oil Company and Shell Oil Company, each hold leases or easements from the State of California administered by the SLC. Said leases or easements will come up for renewal at various times in the future. As each of them matures, the SLC proposes, on information and belief, to require a throughput charge which will apply to imports and to intrastate, interstate and foreign commerce as to each of said leases or easements. The amounts involved are many millions of dollars per year and will far exceed the reasonable rental value of such lands. In each instance, such facilities are essential to the operation of refineries, terminals, production facilities and other basic parts of plaintiffs' businesses.

19. The foregoing allegations of paragraphs 17 and 18, while speaking in terms of interstate and foreign commerce, as well as intrastate commerce, are not designed to put the Constitutional issues referenced in paragraph 13 herein in issue.

20. As a result of the implementation of these regulations, members of plaintiff WOGA, including the other plaintiffs herein, are being forced, and will continue to be forced, due to the virtual monopoly exercised by the State on the lands subject to such leases, to pay said unlawful charges to the State.

21. Plaintiffs have exhausted all their administrative remedies.

22. Plaintiffs have no plain, speedy and adequate remedy at law. The enforcement of this regulation, unless enjoined, will force WOGA members, including the other plaintiffs herein, to enter into leases containing unlawful throughput charges and to pay unlawful charges in the amounts of millions of dollars per year, no part of which may ever be recovered.

SECOND CAUSE OF ACTION
(Declaratory Relief)

23. Plaintiffs incorporate herein by reference paragraphs 1 through 22 of their First Cause of Action.

24. An actual controversy has arisen and now exists between plaintiffs and defendant concerning the validity of defendant's throughput rental regulations. Defendant asserts that such regulations are valid and lawful and plaintiffs assert them to be invalid and unlawful. Plaintiffs are entitled to a judicial declaration regarding the validity of these regulations.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid as written;

2. For a declaration that those portions of the SLC's regulations purporting to charge rental on the basis of the volume of commodities crossing State property, as set forth in Exhibit "A" hereto, are unlawful and invalid as applied to the specific leases alleged in paragraph 17;

3. For a preliminary and permanent injunction against defendant's enforcement of such regulations, Exhibit "A" hereto, and specifically prohibiting its demanding and collecting rentals pursuant to such regulations, generally and with respect to the leases alleged in paragraph 17;

4. For costs of suit herein; and,

5. For such other relief as the Court deems appropriate.

DATED: January 25, 1979.

Ingoglia, Marskey & Kearney
McCutchen, Black, Verleger & Shea
Philip K. Verleger
Max K. Jamison
Betty-Jane Kirwan
Michael M. Johnson
By /s/ Betty-Jane Kirwan
Attorneys for Plaintiffs

[Verification, Exhibit "A," and proof of service by mail omitted in printing. For text of regulations as originally amended, see J.S. App. H, p. A-38. For current text of regulations, see J.S. App. G, p. A-29.]

Exhibit 2

Superior Court of the State of California
County of Sacramento

No. 267822

Western Oil and Gas Association, Pacific Refining Company, Edgington Oil Company, Atlantic Richfield Company, Exxon Corporation, Getty Oil Company, Tosco Corporation, Shell Oil Company, Chevron U.S.A. Inc., and Union Oil Company of California,
Plaintiffs,

v.

California State Lands Commission,
Defendant.

[Endorsed Mar. 15, 1979]

JUDGMENT

The Court having previously issued its Order on Cross-Motions for Summary Judgment in this matter, and that Order having provided for entry of judgment in favor of defendant,

NOW, THEREFORE, IT IS HEREBY DECLARED AND ADJUDGED:

1. That sections 2005 and 2006 of the regulations of defendant California State Lands Commission (Cal. Admin. Code, tit. 2, §§ 2005, 2006, formerly §§ 2006, 2007), which authorize rentals based upon the volume of commodities passing over the leased land, are lawful and valid.

2. That the following leases of defendant, which are referred to in paragraph 17 of the Amended and Supplemental Complaint, are lawful and valid insofar as they provide for specific rentals and rental formulas based upon the volume of commodities passing over the leased land:

(a) Lease P.R.C. 3414.1 (plaintiff Pacific Refining Company, lessee);

(b) Lease P.R.C. 600.1 (plaintiff Union Oil Company of California, lessee);

(c) Lease P.R.C. 3453.1 (plaintiff Tosco Corporation, lessee); and

(d) Lease P.R.C. 236.1 (plaintiff Chevron U.S.A. Inc., lessee).

3. That plaintiffs, and each of them, be, and hereby are, denied any injunctive relief whatsoever.

4. That, except for the declarations contained in paragraphs 1 and 2 above, plaintiffs, and each of them, take nothing by this action.

5. That defendant be, and hereby is, awarded its costs of suit against plaintiffs, jointly and severally, in the amount of $.

Dated: March 15, 1979.

Lawrence K. Karlton
Judge of the Superior Court

United States District Court
Eastern District of California
[Title omitted in printing]

[Filed Feb. 12, 1981]

ANSWER

In answer to the complaint, it is admitted, denied, and alleged as follows:

First Claim

1. Answering paragraph 2, it is admitted that, on April 28, 1976, the California State Lands Commission (hereinafter "Commission"), at that time consisting of State Controller Kenneth Cory, then State Lieutenant Governor Mervyn M. Dymally, and then State Director of Finance Roy M. Bell, adopted amendments to the ground lease regulations of the Commission which included among the types of rent authorized by said regulations a type of rent based upon the volume of commodities passing over the leased land. No specific rates were included in the amendments. This volumetric rental mode is applicable to commercial, industrial, and right of way leases and applies to all types of land administered by the Commission. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

2. Answering paragraph 4, the allegations of the first and last sentences are admitted and it is admitted that Kenneth Cory is the chairman of the Commission. Each and every one of the remaining allegations of said paragraph is denied.

3. Answering paragraph 6, it is admitted that the State of California (hereinafter "State") holds title to some uplands, some tide and submerged lands, and some submerged lands beneath streams and other navigable waters, within the State; and that some cities, counties, districts, other public agencies, and private persons hold title to some of

the remaining portions of each type of land listed above. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

4. Answering paragraph 7, it is admitted that the Commission has authority by statute to lease those tide and submerged lands and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits that are owned by the State, and that such leases must be authorized by the Commission. Except as expressly herein admitted, each and every allegation in said paragraph is denied.

5. Answering paragraph 3, it is admitted that tide and submerged lands located within California are used for wharves, other permanent mooring facilities, and pipelines from offshore federal oil and gas leases, across, over, or through each of which petroleum and petroleum products are transmitted. Some of the tide and submerged lands so used are owned by the State; other portions of the tide and submerged lands so used are owned and administered by cities, counties, districts, and other public agencies that are recipients of legislative grants of such lands from the State. Some of the petroleum and petroleum products that move across, over, or through the aforementioned facilities are being transported in interstate or foreign commerce. Except as expressly herein admitted, each and every allegation of said paragraph is denied.

6. Each and every allegation of paragraph 9 is denied.

7. Answering paragraph 10, said paragraph consists solely of conclusions purporting to be accurate statements of law, as opposed to fact. As such, they are not deemed admitted if not responded to. Nevertheless, to the extent that said conclusions are not accurate statements of law, they are denied. Any implication in subdivision (a) of said paragraph that rent is a tax or duty is specifically denied, and any implication in subdivision (c) of said para-

graph that rent calculated on the volume of commodities passing over leased land is a duty of tonnage is specifically denied.

8. Answering paragraph 11, paragraph 8 of this Answer is hereby incorporated herein by reference. It is admitted that the Commission, as to lands that are owned by the State and administered by the Commission, has made ground leases for such lands, including tide and submerged lands, and that some of said leased lands have been used for the construction of wharves, similar facilities, and pipelines. In many cases, the Commission leases unimproved land without the provision by the Commission of additional facilities or services. Prior to April 28, 1976, the Commission collected rent for ground leases based upon a percentage of negotiated fee value, or a percentage of gross receipts, or, for pipelines only, a rental based upon a stated number of cents per diameter inch per lineal foot of pipeline. Except as expressly herein admitted, each and every allegation of paragraph 11 is denied.

9. Answering paragraph 12, paragraph 1 of this Answer is hereby incorporated herein by reference. Except as expressly herein admitted, each and every allegation of paragraph 12 is denied.

10. Answering paragraph 13, it is admitted that, as new ground leases for commercial, industrial, or right of way uses are applied for, or as such leases come up for renewal or rental renegotiation as provided for in some leases, or as lessees under such leases request modifications in existing leases, the Commission reviews the criteria contained in section 2005(h) of its regulations (Tit. 2, Cal. Admin.Code, § 2005(h)) to determine whether use of a volumetric rental mode, as authorized by section 2005 of its regulations, is appropriate. Where such volumetric rents are found to be appropriate, they are negotiated with the lessee on a case-by-case basis. Except as expressly herein

admitted, each and every allegation of said paragraph is denied.

11. Each and every allegation of paragraph 14 is denied.

12. Answering paragraph 15(a), it is admitted that plaintiff WOGA's membership includes companies that produce, transport, refine, and market crude petroleum in the Western United States and California, that some member companies use pipelines located on tide and submerged lands within the State of California to transport crude petroleum, natural gas, or refined petroleum products, and that some member companies use wharves, anchorages, or similar facilities at which tankers are moored and over which various commodities pass. Some of the aforementioned commodities are being transported in interstate or foreign commerce. Except as expressly herein admitted, each and every allegation of the first two sentences of paragraph 15(a) is denied, based upon a lack of information or belief sufficient to admit or deny said allegations. Each and every allegation of the third sentence of paragraph 15(a) is denied.

13. Answering paragraph 15(b), the allegations of the first, second, and fourth sentences are admitted. A firm rent was not fixed at the time of the original lease to Sequoia Refining Corporation, and a firm rent still had not been fixed at the time of the assignment of the lease to Pacific Refining Company. Contemporaneously with the assignment of the lease to Pacific, a volumetric rent was negotiated with Pacific and incorporated into an amendment of the original lease. Such rents are currently exceeding $75,000.00 per year. It is admitted that Pacific's refinery is served by facilities at which vessels are moored and loaded and unloaded, that said facilities are located on land under lease from the State, and that some of the commodities over said facilities are transported in interstate or foreign commerce. It is denied that all such commodities are being

transported in interstate commerce or foreign commerce, or both, based upon a lack of information or belief sufficient to admit or deny said allegation. Except as expressly herein admitted, each and every one of the remaining allegations of paragraph 15(b) is denied.

14. Answering paragraph 15(c), the allegations of the first sentence are admitted. Answering the second through fourth sentences of said paragraph, it is admitted that Union has negotiated a volumetric rent with the Commission in connection with the renewal of its lease for wharf facilities serving its San Francisco refinery, that said rent is calculated with reference to the volume of crude and refined petroleum passing over the leased land, and that the average annual volumetric rent under said lease has been approximately $90,000.00 per year. Except as expressly herein admitted, each and every remaining allegation of paragraph 15(c) is denied.

15. Answering paragraph 15(d), it is admitted that plaintiff Tosco Corporation holds a lease from the Commission for wharf facilities over which coke and other commodities are transported; that said lease was renewed in March 1976, prior to the amendment of the Commission's regulations to authorize the negotiation of volumetric rents; that the renewal fixed an annual rent of $9,266.40, which was considered by the Commission to be a fair rent under the authorized rental modes then in use by the Commission; that said renewal provided that the rent could be later reset to conform with any subsequent changes or additions to the Commission's rental regulations; and that, by letter dated July 29, 1976, the Commission staff proposed a volumetric rent of five cents per ton computed with reference to any and all bulk commodities passing over the leased premises and a minimum rent of 9,266.40. To date, no volumetric rent has been negotiated regarding said lease. Except as expressly herein admitted, each and every allegation of paragraph 15(d) is denied.

16. Answering paragraph 15(e), it is admitted that plaintiffs Exxon Corporation, Getty Oil Company, Shell Oil Company, and Standard Oil Company of California each hold ground leases from the State that are administered by the Commission and that some of those leases will be coming up for renewal in the future. As such leases come up for renewal, the Commission will consider the appropriateness of the volumetric rental mode, using the criteria set forth in section 2005(h) of its regulations, and volumetric rents will be negotiated in those situations where they are determined to be appropriate by the Commission. Except as expressly herein admitted, each and every allegation of paragraph 15(e) is denied.

17. Each and every allegation of paragraph 16 is denied.

18. Answering paragraph 17, it is admitted that plaintiffs have exhausted their administrative remedies with regard to challenging the validity of the general authorization contained in the Commission's regulations for the charging of rents based upon the volume of the commodities passing over the leased land.

19. Each and every allegation of paragraph 18 is denied.

SECOND CLAIM

20. Answering paragraph 19, paragraphs 1 through 19, inclusive, of this Answer are hereby incorporated herein by reference.

21. Answering paragraph 20, it is admitted that those wishing to lease State-owned lands that are administered by the Commission must apply to the Commission for a lease, and that lands that are the subject to such lease applications must be appraised pursuant to California Public Resources Code section 6503 upon receipt of the

application. Except as expressly herein admitted, each and every allegation of paragraph 20 is denied.

22. Each and every allegation of paragraph 22 is denied.

THIRD CLAIM

23. Answering paragraph 23, paragraphs 1 through 19, inclusive, and 21 and 22 of this Answer are hereby incorporated herein by reference.

24. Answering paragraph 24, it is admitted that an actual controversy exists between some of the plaintiffs and the Commission concerning the validity and lawfulness of the amendments to the Commission's regulations that authorize an alternative volumetric rental mode whereby rent is computed based upon the volume of commodities passing over the leased land. It is further admitted that said plaintiffs are entitled to a declaration concerning the validity of said regulations, but that said declaration should be that the regulations are lawful and valid.

FIRST AFFIRMATIVE DEFENSE

25. Plaintiffs' Second Claim has been finally adjudicated in the California State courts. Accordingly, prosecution of that claim is barred by res judicata.

SECOND AFFIRMATIVE DEFENSE

26. In the State court litigation referred to in paragraph 25 above, it has been finally adjudicated that the Commission's regulations, insofar as they authorize the Commission to charge rent for ground leases based upon the volume of commodities passing over the leased land, are not unreasonable, arbitrary, or capricious. Accordingly, plaintiffs are collaterally estopped from asserting in this litigation that said volumetric rental mode is an unreasonable method of computing rent for ground leases.

WHEREFORE, it is prayed:

1. That a declaration issue declaring that sections 2005 and 2006 of the regulations of the California State Lands Commission (Cal. Admin. Code, tit. 2, §§ 2005, 2006, formerly §§ 2006, 2007), which authorize rents for the leasing of State land based upon the volume of commodities passing over the leased land, are lawful and valid;

2. That plaintiffs, and each of them, be denied any injunctive relief whatsoever;

3. That, except for the declaration set forth in paragraph 1 of this prayer, plaintiffs, and each of them, take nothing by this action;

4. That defendants be awarded their costs of suit against plaintiffs, jointly and severally; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: February 11, 1981.

George Deukmejian
Attorney General
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
Attorneys for Defendants

[Affidavit of service by mail omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 84-16

Kenneth Cory, Leo T. McCarthy and Jesse R. Huff,
Appellants,

v.

Western Oil and Gas Association, et al.

APPEAL from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 1, 1984

Justice O'Connor took no part in the consideration or decision of this case.

No. 84-16

In the Supreme Court
OF THE
United States

KENNETH CORY, LEO T. MCCARTHY, and JESSE R. HUFF, members of the California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX (Vol. II)

JOHN K. VAN DE KAMP
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

PHILIP K. VERLEGER
(Counsel of Record)
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK, VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 624-2400
Counsel for Appellees

Appeal docketed July 5, 1984
Probable jurisdiction noted October 1, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Volume II

Excerpts from the administrative record compiled before the California State Lands Commission in connection with the adoption of the challenged regulations, lodged with the district court on January 5, 1981.

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VOLUME II

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*Printed as Exhibit 1 to the affidavit of Gary R. Horn, set forth earlier in this Joint Appendix, and not reprinted here.

STATEMENT BY STANDARD OIL COMPANY OF CALIFORNIA

DATED MAY 2, 1975

Statement on behalf of
Standard Oil Company of California
before Administrative Hearing of California State
Lands Division regarding the proposed revision of
Article 2, 2 California Administrative Code

Friday, May 2, 1975
Long Beach, California

My name is John T. Brewster. I am Manager of the Pipe Line Department of Standard Oil Company of California's Western Operations, Incorporated. I appreciate the opportunity to present to you my company's reactions to the proposal to repeal Article 2 of California Administrative Code, Title 2, Division 3, and adopt a new Article 2 thereof.

I will confine my comments to those portions of the proposed Article 2 that would immediately affect my company, the petroleum industry in California, and through them the consuming population of the State.

We agree that for Industrial Leases rental rates computed at the rate of 8% per annum of the appraised value of the leased land is equitable under present day conditions. As you know, we have in the past objected and continue to object to the method of appraisal used by the Lands Division that equates the value of submerged land with that of developed or developable adjoining onshore lands. This we consider to still be a matter for good faith negotiation between the State and the private parties involved.

We feel very strongly that the application of a throughput charge to determine the rental for unimproved submerged lands is highly inequitable and will have over-all consequences unfavorable to the people of the State.

Inasmuch as the State does not provide the pipelines, wharves or other facilities used, the value of the rights-of-way and occupancy over State lands has no logical relation to the number of barrels of petroleum or cubic feet of natural gas that may be transmitted through pipelines or over wharves built by a lessee. In effect it would amount to a toll or tax on the commodities for crossing State land. The throughput charges in the current proposal demonstrate their gross inequity as rental for space occupied, as illustrated by some examples:

1. Consider a hypothetical 3,200-foot long 18-inch submarine pipeline at a marine terminal loading 40,000 barrels per day of crude oil to tankers. The proposed rate of 1.6¢ per barrel would total $233,600 per year. The area of ocean bottom occupied by the pipeline would be only 0.110 acres. The annual rental would be equivalent to over *$2 million per acre per year.* At 8% this would represent a value of over *twenty-six million dollars per acre* for the occupied strip of ocean bottom.

2. My company has an eight-inch diameter petroleum products pipeline from its Richmond, California, refinery to Sacramento. It crosses Honker Bay, four sloughs, and the Sacramento River. We have a twenty-five foot wide right-of-way lease from State Lands across each. The total leased area is 2.54 acres. The proposed charges, based on our throughput of about 9,000 barrels per day, would total 4.2¢ per barrel, or $137,970 per year. This is equivalent to a rental of $54,319 per acre per year. At 8% it represents a land value of $679,000 per acre for underwater mud.

In the second example above, the present total annual charge for the six water crossings is $336. The increase would be $4,000%.

For our existing Estero Bay Marine Terminal the increase would be 1,100%. For Richmond Refinery's two wharves it would be 4,250%.

As startling as these per-acre rentals and tremendous increases are, they are not the end. The cumulative effect on the public and the economy of California would be much greater than is apparent by considering the throughput charge at any specific location. To illustrate, using the proposed charges:

Crude oil is loaded to tankers at our Estero Bay Terminal for shipment to Richmond Refinery	1.6¢/bbl.
Crude offloaded to Refinery	1.4¢/bbl.
Fuel Oil produced, loaded to tankers from Refinery	1.4¢/bbl.
Fuel Oil offloaded to coastal power plant—approximately	1.6¢/bbl.
Total transportation increase	6.0¢ bbl.

The increased cost of fuel to the electric utility and the increased cost of delivering petroleum products to Sacramento cited above will, in the end, be paid by the California public, which illustrates again that a throughput charge would be a tax and not a rental.

Even this may not be the end. A precedent set by the State Lands Commission could well be adopted by counties and cities of the State for the thousands of miles of oil and gas pipelines that run under their roads and streets on franchises. If each local government were to adopt a schedule similar to the present proposal, the total could be in dollars, rather than cents, per barrel or per 6,000 cubic feet of gas. Who would pay? The people of the State.

The proposed throughput charges are so grossly disproportionate to the value of the tide and submerged lands occupied by pipelines and terminal facilities that one would have to conclude that the State Lands Commission is willing, if it adopts them, to ignore the fundamental premise on which its actions are based. California's tide and submerged lands are held under a common law trust for the benefit of the people; and the administration of those

lands is an exercise—or breach—of trust powers, not proprietary powers. The effect of the proposed throughput charges would not be to foster, but to hinder, the use and development of the State's tide and submerged lands, and the charges would not "milk" those who have made substantial investments in reliance on prior State Lands Commission policies but would, instead, contribute significantly to the inflation of energy costs and operate to plunder the pocketbooks of California's consumers of electric power, natural gas, and petroleum products, and indirectly, all segments of the public. It should be made clear to the public that it is they, not the petroleum industry and natural gas utilities, that would be the ultimate victims of this rapacity.

In summary, Standard Oil Company of California feels that 8% per annum is a fair return on a fair appraised value of State Lands. We consider any throughput charge used as the basis for land rental or right-of-way to be inappropriate and to threaten far-reaching consequences to the California oil and natural gas industries and the public.

We consider the specific schedules of throughput charges proposed to be unreasonable in relation to value rendered by the State in leasing unimproved submerged lands, and particularly call to your attention the pyramiding effect of throughput-added-to-throughput.

We urge, therefore, that the State Lands Commission retain substantially the present regulation as the basis for rentals, particularly as a means of avoiding an untimely and adverse impact on the people and economy of California.

STATEMENT BY GULF OIL COMPANY

DATED MAY 2, 1975

Statement of Spencer C. Sheldon
Regional Director of Governmental Relations
Gulf Oil Company—U.S.
at the Public Hearings of the
California State Lands Commission
May 2, 1975
Long Beach, California
Concerning Proposed Rules and Regulations
for State Non-Extractive Leases

Gentlemen:

I am Spencer C. Sheldon, Regional Director of Governmental Relations for Gulf Oil Company—U.S., the domestic operating arm of Gulf Oil Corporation.

I would like to express our appreciation at having this opportunity to present Gulf's views on the State Lands Commission's newly proposed rules and regulations for non-extractive leases.

As the staff well know, Gulf in the past has objected to the basis on which the appraised value of the state's submerged leased lands have been determined. We continue to object to appraisal techniques that only look to the highest per acre rent that has been agreed to by the most recent lessee of state lands.

Because the State Lands Commission holds a position of virtual monopoly over the tracts of state land that are the essential corridors to California's centers of commerce and industry, they have gone past the point of seeking the full and fair rental the citizens of California are rightly entitled to for the exclusive use of state lands by a commercial company. The proposal of these new regulations indicates however, the endorsement of a residual appraisal technique that is consistent with the Commission's monopoly position.

A technique which says in essence; Mr. Lessee, because your facility must shut down, and is therefore worth nothing without a state lease, it follows that the state lease is worth the full cost or value of your facility.

An appraisal approach which follows this fallacious line of reasoning is certainly not in the best interest of California consumers as they must pay in the long run all costs imposed on business. We suggest that this problem will not be corrected until the staff of the Commission makes a concerted effort to key the value of state submerged lands to those upland tracts whose value has been determined by the action of a free market.

Let me now turn from Section 2006 of the proposed regulations to Section 2008, which proposes to establish a throughput charge for pipelines. The cover letter sent out with these proposed regulations makes the point that the throughput rental is "designed to bring Commission leasing policies into line with practice commonly used by ports, the most comparable leasing entities to the Commission." This is a totally inaccurate comparison because unlike facilities on state lands, the facilities controlled by the various Port Authorities operating in California's harbors have been constructed with funds raised by those entities. The fees charged by them are necessary to recover *their* capital investment, the cost of maintaining *their* facilities and a return on the invested capital sufficient to pay the interest charges necessary in cases where the original capital was obtained by the issuance of bonds or other debt instruments.

In the case of the State Lands Commission, there is no capital investment to recover. As in the case of Gulf facilities, it is Gulf that has invested capital to construct the wharf facilities on the state lands that we lease and it is Gulf that pays the maintenance costs and takes the risk of damage or destruction.

In consideration of these proposed regulations, I would also hope that the staff would be able to provide a full analysis to the Commission as to their effect on, and interrelation with, programs and objectives of other state agencies.

For instance, has data been developed by the staff which sets out with any certainty, the effects the proposed throughput charge will have on sources of crude oils currently being used by California refiners. That is, will the environmental objectives of agencies such as the Air Resources Board be mitigated or frustrated to any extent because these proposed regulations cause a shift in normal crude oil supply channels.

I don't know the answer to the question, but I think it important that the Commission does, before it takes any action on these proposals.

In a similar area, California's new Energy Resources Conservation and Development Commission has been working closely during the last several months with the various segments of the energy industry for the implementation of a centralized state energy information system as mandated by the legislature last year. These quarterly energy reports will contain both historical operating data and company projections for a subsequent twelve month period and will go a long way in permitting state agencies to understand the dynamics of the California energy market. The first reports are now being filed with the Energy Commission. And in our opinion, it would be untimely and imprudent for the State Lands Commission to take any action on these proposed regulations until the Energy Commission has been afforded an opportunity to analyse their significance and effect on California energy consumers.

And finally, it is clear to me that a throughput charge which would increase Gulf's annual payments with respect to only one of its California refiners by approximately

950%; a throughput charge that is not required as the result of any capital invested by the State, as is the case with Port leasing entities, can not be characterized as a rental, but is in fact a general revenue tax.

If a new tax is what we are talking about, and I believe it is, then we are in the wrong forum. While certainly the State Lands Commission has sufficient mandated authority to regulate the use of state lands and determine their fair rent, it does not have authority to impose taxes through regulation. That is a privilege that continues to be reserved by the California Constitution to the State Legislature.

I suggest that the Commissioners of State Lands Commission have more than sufficient political influence to have the tax measure embodied in Section 2008 of the proposed regulations placed before the California Legislature. While I can assure you my company would continue to oppose such a tax before the Legislature, as I assume would others, I am convinced that that would be the correct forum for this tax proposal to be debated and acted upon.

Again, I want to thank you for the opportunity to express these views.

STATE LANDS COMMISSION QUESTIONNAIRE DATED JUNE 19, 1975

June 19, 1975
File Ref.: W 5125.8

Pacific Gas & Electric Company
77 Beale Street
San Francisco, CA 94106

Attention: R. W. O'Neill

Gentlemen:

Subject: *Commission Leasing Rental Based On "Throughput"*

Pursuant to the State Lands Commission's May 27, 1975 authorization for staff to further investigate the concept of rental rates based on throughput (see Attachment A), I have been requested to obtain information from your company relevant to the new Article 2 (Section 2000 et. seq.) of Title 2, California Administrative Code. This is in response to the request of many to have additional discussion and analysis of the proposed rental policy based on "throughput."

Attached hereto (Attachment B) is a list of questions relevant to this investigation. The Commission has deferred action anticipating a timely response to these questions preparatory to open discussions with you and other entities that may be affected by such changes to the Commission's regulations. I anticipate holding several informal open discussions with major interest groups (i.e. oil companies and/or Western Oil and Gas Association, utility companies, pipepline companies, etc.) during the latter part of July. The purpose of these meetings will be to clarify, update and analyze the responses received on the attached questionnaire.

You are requested to provide responses to the questions, in appropriate detail, by mid-July. Include any relevant

data that may apply regarding this study. I will contact you again in the near future regarding the dates and times of the aforementioned open discussions.

Please feel free to call me at (916) 445-7738 should you have any questions on the information requested.

Sincerely,

GARY R. HORN
Land Agent

[Attachment A omitted in printing]

Attachment B

1a. Identify by geographic area and State Lands Commission lease number the annual volume of petroleum products crossing lands under the State Lands Commission's jurisdiction. Petroleum products shall include crude products, petroleum derivatives, natural gas, etc. (in barrels and/or thousand cubic feet).

1b. Identify by geographic area the above information projected through the year 1980.

1c. Identify by geographic area any plans for additional facilities to be located on, or to cross land under State Lands Commission jurisdiction in the next five years.

2. Identify any existing leases for which you are currently paying rent based on throughput. Include leases with public agencies and port districts as well as private parties. Information should include the lessor, the area of lease, length and size of pipeline, terms, conditions, and rental rates.

3a. Identify any of your facilities not on State Lands Commission land, which you lease to other parties on the basis of throughput. Information should include name of lessee, area of lease, length and size of pipeline, terms, conditions and rental rates.

4a. Identify any of your facilities under State Lands Commission jurisdiction, which are operated for the convenience and purpose of supplying petroleum products to a governmental agency. Identify the agency, the amount supplied to it annually, the rate for delivery, and the State Lands Commission lease number.

4b. Identify any of your facilities not under State Lands Commission jurisdiction which are operated for the convenience and purpose of supplying petroleum products to a governmental agency. Identify the agency, the facility, the amount supplied, and the rate for delivery.

4c. Identify whether the rental rates for the above leases vary from the rate for other petroleum products delivered at the same facility. If it does vary, identify the special rental rate.

5a. Identify any of your pipeline facilities that are regulated by the ICC and/or the CPUC.

5b. Forward a copy of the tariff for each pipeline route identified above.

5c. Upon what basis was the transportation rate in the tariff computed? What services are included in this transportation rate?

6. Identify any effect that a throughput rental rate will have on your pipeline operations.

7. Will you authorize the release of pertinent data contained in agreements between your company and any other company, corporation, or individual regarding the sale and transportation of petroleum and related products?

RESPONSE OF HOLLY CORPORATION

JULY 2, 1975

Mr. Gary R. Horn
Land Agent
State Lands Division
1807 13th Street
Sacramento, California 94814

Re: *Commission Leasing Rental Based on "Throughput"*

Dear Mr. Horn:

In regards to your letter dated June 25. 1975, requiring certain information regarding our dock which is located on State owned lands, hopefully the following will satisfy your requirements:

1a. The Holly Corporation owns and operates the Ozol terminal which is located approximately 2½ miles west of Martinez on the south side of the Carquinez Straits. At the present time we handle two types of products at the terminal, being government owned JP-4 and government owned 115/145 aviation gas. At the present time the majority of our receipts to the terminal come by the way of tanker and barge; receipts being approximately 3,000,000 barrels per year. The majority of the receipts being JP-4. Our State Lands Commission Lease is No. 2408.1.

1b. We project approximately 3,000,000 barrels per year of receipts through 1980. It must be noted that this projection is hard to determine due to the fact that the government has exclusive use of the terminal, and all shipments and receipts are directed by them.

1c. At the present time we do not have any plans for additional facilities to be located on or to cross land under the State Lands Commission jurisdiction.

2. We do not have any existing leases for which we are currently paying rent based on throughput.

3a, 4a & 4b. As previously noted, our terminal is under exclusive lease to the Defense Fuel Supply Center. Our terminal lies on approximately 42 acres of land, exclusive of the dock lease. There are 12 83,333 barrel underground storage tanks. In addition we have an 8" pipe line approximately 8 miles in length which connects to our Concord pump station. At the present time the government has one year options to renew this lease through May, 1980. The rental rates for this terminaling is based on a use charge per barrel of shell capacity per year. We do charge the government for excess throughput provided that the receipts and shipments exceed 3,100,000 barrels.

4c. Not applicable.

5a. As mentioned above, we have a 8" pipe line approximately 8 miles in length connecting our terminal to our Concord pump station.

5b. Not applicable.

5c. Not applicable.

6. As has been previously noted, the government is the exclusive lessee of our terminal under a contract which was negotiated approximately 15 years ago. Our lease rate is substantially lower than commercial rates in that area. In addition, exclusive of the throughput charges, our contract is a fixed price type and any increase in rental rates for our dock will have a negative effect on our operation, especially since our Ozol terminal operations have been experiencing an operating deficit for the past several years.

7. Any releases of pertinent data pertaining to agreements between our company or any other company, corporation or individual regarding the sale and transportation of petroleum and related products will have to be determined on an individual basis.

Sincerely yours,

/s/ David B. Norsworthy
Operations Manager

DBN/pf

RESPONSE OF BURMAH OIL AND GAS COMPANY

JULY 11, 1975

California State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814
Attention: Mr. G. R. Horn

Gentlemen:

In reply to your letter of June 19, 1975, requesting responses to questions posed in your Attachment B, we have provided the following information to the specific questions relevant to Burmah Oil and Gas Company's operations:

Commission Leasing Rental Based on Throughput
Attachment B

1a. Burmah Ellwood Marine Terminal
P.R.C. 3904.1—$278.00 annual fee
1,460,000 barrels through marine loading line annually.

1b. Burmah Ellwood Marine Terminal projected throughput through the year 1980—3,650,000 barrels (Based on abandonment by end of 1977).

1c. Proposed Burmah Dos Pueblos Marine Terminal Ellwood area.

2. Burmah Stockton Terminal, leased from the Stockton Port District. Land rent for ±5.33 acres is $573.00 per month plus a $.005 per barrel charge for all pipeline receipts into terminal via Southern Pacific Pipe Line Company.

6. A rental based on throughput would result in increased operating cost with no compensating services or benefits accruing to the affected businesses.

7. This would be questionable.

Yours very truly,

/s/ Ray T. Togni
Ray T. Togni,
Superintendent of Terminals

RTT:mds

cc: J. H. Loeb
C. E. Woods
R. Geggins

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY

JULY 14, 1975

SLC Leasing Rental Based on "Throughput"
Your File: W 5125.B
State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814
Attention: Mr. Gary R. Horn,
Land Agent

Gentlemen:

In your letter of June 19, you asked that we supply the answers to seven questions relevant to the investigation of the concept of pipeline lease rental rates based on quantities of gas transported (throughput charge) for the use of State Lands Commission (SLC) administered lands. PGandE has attempted to answer these questions as completely as is possible considering the scope, diversity, and complexity of pipeline operations within our service area. PGandE welcomes informal open discussions with your staff because it will enable us to discuss in detail the important legal, social, and economic issues raised by your proposal to change the factors upon which rental for pipeline rights of way has traditionally been based.

If PGandE can be of any further assistance, please call Elmer H. Dunstan, (415) 781-4211, extension 2462.

Very truly yours,

/s/ P. J. Matthews
P. J. Matthews
Supervisor of Permits and
Environmental Planning

EHDunstan:MZ
Attachments

EXHIBIT "A"

1a. Identify by geographic area and State Lands Commission lease number the annual volume of petroleum products crossing lands under the State Lands Commission's jurisdiction. Petroleum products shall include crude products, petroleum derivatives, natural gas, etc. (in barrels and/or thousand cubic feet).

1b. Identify by geographic area the above information projected through the year 1980.

P.R.C. Number	SLC Lands	Geographic Location				Annual Volume of Petroleum Products (BCF)						
		T.	R.	Sec.	Mer.	1974	1975	1976	1977	1978	1979	1980
1402.1	Mokelumne River	4N.	4E.	17	MDB&M	4.7	4.87	5.04	5.21	5.38	5.55	5.72
2536.1	Sacramento River	4N.	4E.	17		NA						NA
2538.1	Georgiana Slough	4N.	4E.	20		NA						Not Available
611.1	Sacramento River	4N.	4E.	17		NA						NA
3956.1	Georgiana Slough	4N.	4E.	16		NA						NA
4037.1	S. Fk. Mokelumne River	4N.	5E.	7		.02	.018	.016	.014	.012	.010	.008
362.1	Mokelumne River	4N.	6E.	21		.03	.031	.332	.033	.034	.035	.036
4018.1	Mokelumne River	4N.	6E.	35		13.5			No Change			13.5
4902.1	Mokelumne River	4N.	6E.	21		4.5						4.5
2477.1	Snodgrass Slough	5N.	4E.	36		NA						NA
2612.1	Georgiana Slough	5N.	4E.	35		NA						NA
461.1	Sacramento River	9N.	4E.	28		NA						NA
1777.1	Sacramento River	8N.	4E.	3		NA						NA
2817.1	Sacramento River	14N.	1E.	8		1.8	1.62	1.44	1.26	1.08	.9	.72
4021.1	Old River	1S.	4E.	20		.31	.279	.248	.217	.186	.155	.124
2953.1	San Joaquin River	1S.	6E.	5		.75	.675	.600	.525	.450	.375	.300

P.R.C. Number	SLC Lands	Geographic Location T.	R.	Sec.	Mer.	Annual Volume of Petroleum Products (BCF) 1974	1975	1976	1977	1978	1979	1980
3610.1	Stanislaus River	2S.	8E.	29	MDB&M	7.3	7.63	7.96	8.29	8.62	8.95	9.28
3772.1	Stanislaus River	2S.	9E.	24		.075	.078	.082	.085	.089	.092	.095
407.1	San Joaquin River	3S.	6E.	13		23.8	24.7	25.5	26.4	27.2	28.1	29.0
590.1	Tuolumne River	3S.	9E.	33		NA						NA
3641.1	Tuolumne River	4S.	8E.	11		NA						NA
353.1	Tuolumne River	4S.	8E.	11		4.3	5.02	5.23	5.45	5.66	5.88	6.10
4672.1	San Joaquin River	5S.	8E.	36		2.74	2.84	2.94	3.04	3.14	3.24	3.34
459.1	San Joaquin River	13S.	18E.	6		NA						NA
1531.1	School Lands (Trona)	28S.	41E.	16		16.2						16.2
1487.1	Corte Madera Creek	1N.	6W.	10		4.2	4.33	4.45	4.58	4.70	4.83	4.96
2805.1	Grizzly Slough	3N.	1W.	13		NA						NA
2804.1	Roaring River	3N.	1W.	24		NA						NA
726.1	Petaluma Creek	4N.	7W.	2		NA						NA
1981.1	Petaluma Creek	4N.	7W.	2		11.7	12.1	12.4	12.8	13.1	13.5	13.9
762.1	Napa River	5N.	4W.	34		14.5	15.01	15.52	16.03	16.54	17.05	17.56
646.1	Napa River	5N.	4W.	11		14.5	15.01	15.52	16.03	16.54	17.05	17.56
4586.1	Sacramento River	15N.	1W.	4		6.64	5.98	5.31	4.65	3.98	3.32	2.66
						132.065						145.563
2906.1	Old River	1N.	4E.	6		11.7			No Change			11.7
498.	Old River	1N.	4E.	6		11.7						11.7
4020.1	Middle River	1N.	4E.	36		.31	.279	.248	.217	.186	.155	.124
2592.1	San Joaquin River	1N.	6E.	8		.067	.069	.072	.074	.077	.079	.081
2803.1	Honker Bay	2N.	1W.			NA						NA
1867.	San Joaquin River	2N.	2E.	10		20.2	18.5	16.8	15.2	13.5	11.8	10.1

P.R.C. Number	SLC Lands	Geographic Location T.	R.	Sec.	Mer.	Annual Volume of Petroleum Products (BCF) 1974	1975	1976	1977	1978	1979	1980
2480.1	San Joaquin River	2N.	2E.	10	MDB&M	11.7	10.7	9.8	8.8	7.8	6.9	5.9
2570.1	Mayberry Slough	2N.	2E.	9		204.	186.	168.	150.	133.	115.	97.
2572.1	San Joaquin River	2N.	2E.	9		102.	93.	84.4	75.6	66.8	58.	49.0
3202.1	San Joaquin River	2N.	2E.	9		102.	93.	84.4	75.6	66.8	58.	49.0
3422.1	Taylor Slough	2N.	3E.	16		5.						5.0
497.1	Middle River	2N.	4E.			23.4						23.4
499.1A	Whisky Slough	2N.	4E.	25		5.84						5.84
499.1B	Whisky Slough	2N.	4E.	25		11.7						11.7
499.1C	Whisky Slough	2N.	4E.	25		11.7						11.7
495.1	Latham Slough	2N.	4E.	34		23.4						23.4
2904.1	Middle River	2N.	4E.	33		23.4						23.4
2907.1	Latham Slough	2N.	4E.	34		23.4						23.4
4868.1	Latham Slough	2N.	4E.	33		46.6						46.6
4868.1	Middle River	2N.	4E.	33		46.6						46.6
4868.1	Old River	2N.	4E.	33		46.6						46.6
2663.1	Whisky Slough	2N.	5E.	31		23.4						23.4
1868.1	San Joaquin River	3N.	2E.	22		20.2	18.5	16.5	15.2	13.5	11.8	10.1
2539.1	Sacramento River	3N.	2E.	28		204.	186.	168.	150.	133.	115.	97.
2481.1	Three Mile Slough	3N.	3E.	7		11.7	10.7	9.8	8.8	7.8	6.9	5.9
728.1	Three Mile Slough	3N.	3E.	7		20.2						20.2
2009.1	San Joaquin River	2N.	3E.	23		.2	.2	.2	.2	.1	.1	.1
2807.1	Nurse Slough	4N.	1E.			NA						NA
149.1	Sacramento River	4N.	3E.	31		NA						NA
529.1	Sacramento River	4N.	3E.	25		.2	.2	.2	.2	.1	.1	.1
596.1	Georgiana River	4N.	4E.	17		NA						NA
2639.1	Mokelumne River	4N.	4E.	10		.02	.018	.016	.014	.012	.01	.008

P.R.C. Number	SLC Lands	Geographic Location T.	R.	Sec.	Mer.	Annual Volume of Petroleum Products (BCF) 1974	1975	1976	1977	1978	1980	1980
2905.1	S. Fk. Mokelumne River	4N.	4E.	1		NA						.16
1402.1	Mokelumne River	4N.	4E.	17		4.7	4.87	5.04	5.21	5.38	5.55	5.75
						1,015.937						664.773
1838.1	Sacramento River	20N.	1E.	32		2.4			No Change		2.4	
3410.1	Sacramento River	20N.	1E.	32		2.4					2.4	
176.1	Sacramento River	21N.	1E.	22		NA						NA
2822.1	Sacramento River	32N.	5E.	36	MDB&M	4.82	5.29	5.77	6.24	6.72	7.19	7.66
1695.1	Colorado River	7N.	24E.	8	SBB&M	200.	186.	173.	159.	146.	132.	119.
2625.1	Colorado River	7N.	24E.	8	SBB&M	200.	186.	173.	159.	146.	132.	119.
2573.1	Sacramento River	27N.	3W.		MDB&M	346.	348.	350.	351.	353.	355.	357.
1571.1	Fisherman's Cut	3N.	3E.			.2	.2	.2	.2	.1	.1	.1
1390.1	Morro Bay	29S.	10E.			3.4 M^3Bbls.**	4.4	3.7	5.1	5.6	5.2	5.2

*BCF = Billion Cubic Feet of Natural Gas

**M^3Bbls. = Million Barrels of Crude Oil

1c. Identify by geographic area any plans for additional facilities to be located on, or to cross land under State Lands Commission jurisdiction in the next five years.

P.R.C. Number	SLC Lands	Geographic Location				Projected Service	Remarks	
		T.	R.	Sec.	Mer.			
	Middle River	1S.	5E.	24	MDB&M	1976	Proposed crossing within San Joaquin Co. Bridge	
	Merced River	6S.	11E.		MDB&M	1979	Parallel existing facilities	
	Salinas River	15S.	3E.		MDB&M	1976	Replace present facilities	
762.1	Napa River	5N.	4E.	34	MDB&M	1979	Replace present facilities	
						759.220		607.960
						1,907.222		1,418.296

EXHIBIT "B"

2. Identify any existing leases for which you are currently paying rent based on throughput. Include leases with public agencies and port districts as well as private parties. Information should include the lessor, the area of lease, length and size of pipeline, terms, conditions, and rental rates.

Power Plant Locations	Throughput Charges
Hunters Point Power Plant	$.35/T* to Port of S.F.
Potrero Power Plant	$.35/T* to Port of S.F.
Humboldt Bay Power Plant	The greater of either $.02239/Bbl or $15,000/yr.
Offsite Storage	
Urich Oil Co. (UCO), Martinez**	$.03/Bbl on 30,000 Bbl/day Min.
Bray Oil Co., Richmond	$.35/Bbl, includes receipt by rail, storage, heating and delivery into barges.
ARCO, Richmond	$2,200/Mo./Tank (4 tanks) plus $.05/Bbl throughput charge

*1 Ton = 2,200 lbs. = approximately 7 barrels of fuel oil.

**Facility not yet operational.

The above figures cannot in all cases be compared on a common basis and the numbers show only actual costs. The power plant locations are suitable for barge deliveries only. The barges used are generally those under long-term lease by us.

PGandE does not own any part of the facilities at any of the three offsite storage locations under contract. They are: Bray Oil Terminal and ARCO Terminal, both located on the Santa Fe Channel in Richmond and the Urich Oil Company Terminal located in Martinez.

At PGandE's Potrero and Hunters Point Power Plants the two fuel oil receiving docks are leased from the Port of San Francisco with all transition piping to the power plants owned and operated by PGandE.

At PGandE's Humboldt Bay Power Plant the Company has contracted with the owners of the Olsen dock facilities until May 1, 1976 for the use of that dock to receive marine deliveries of fuel oil. PGandE owns and operates the piping between the dock and the power plant.

The kinds of services and facilities furnished at the off-site storage locations under contract with and for use by PGandE are:

Urich Oil Co. (UCO), Martinez

The Urich Oil Company is presently constructing four each 500,000 Bbl. floating roof storage tanks at their Martinez site for exclusive use by PGandE for the next 30 years. All four tanks will be outfitted with heating equipment that will allow for the storage of high pour oils. In addition, UCO is providing PGandE the use of marine wharf facilities capable of accommodating vessels up to 150,000 DWT in size properly lightered to a mass of 80,000 DWT at a design depth of 45 feet. The balance of the facilities at the terminal include:

1. Fire Protection Systems

A. Fixed foam system on the four tanks to protect against seal fires.

B. Portable foam nozzles and hoses for spill fires.

C. Fire water loop system around the tanks.

2. Tank farm piping including one 30-inch pipeline running onto the wharf complete with fuel oil pumps.

3. Tank heating system including a direct fired fuel oil heater with an output of 19 million BTU/Hr.

4. Wharf facilities 1200 feet offshore complete with pipe rack and roadway, breasting and mooring dolphins, loading/unloading arms, fire nozzles and hydrants, oil containment aqua fence and spill cleanup equipment, and communication equipment for emergency use.

5. Operation of the facilities will be on a 24-hour basis with security service provided by on duty personnel. Entire property fenced with the exception of the tressle access to the wharf.

ARCO Terminal, Richmond

ARCO has made available to PGandE under contract a total of four fixed roof fuel oil storage tanks each with a capacity of 50,000 barrels. Each tank is capable of receiving and storing high pour point fuels oils. The two steam generators necessary to provide steam heat to the tanks and steam traced piping are owned and operated by ARCO.

Also included in the storage contract is the use of a marine facility including the necessary traced piping between the tanks and the wharf.

The entire facility is fenced and normally operated 16 hours per day. During non-working hours a security service is provided.

The tanks are protected against fire by an automatic sprinkler system.

Bray Oil Co., Richmond

PGandE has a three-year contract with the Bray Oil Company for a total of 50,000 barrels of storage capacity at Bray's Santa Fe Channel location in Richmond. The following describes in detail the facilities available to PGandE under this contract.

1. Ten each 5,000 barrel fixed roof tanks each coiled and insulated. All piping into and out of the tanks is steam traced and insulated.

2. Truck and rail loading/unloading racks are provided capable of accommodating two tank trucks and eight jumbo rail tankcars, respectively, at one time.

3. Three steam generators each with a capacity of 600 H.P. provide necessary steam heat for tanks and piping.

4. Dock facilities to accommodate barges to load or offload fuel oil. There are a total of four 4-inch pipelines connecting the tanks to the dock. The dock is equipped with an aqua fence to provide oil containment in the event of a spill.

5. Fire protection includes automatic sprinklers on both the racks and docks. There are foam bottles and fire hoses located throughout the tank farm area.

6. Security is provided by facility personnel on a 24-hour basis.

A total quantity of oil purchased by PGandE in 1974 was 15.352 million barrels at a cost of 228.1 million dollars.

EXHIBIT "C"

3a. Identify any of your facilities not on State Lands Commission land, which you lease to other parties on the basis of throughput. Information should include name of lessee, area of lease, length and size of pipeline, terms, conditions and rental rates.

None

The Company does not have any facilities on or off of State Lands Commission lands which we lease to other parties on the basis of throughput.

EXHIBIT "D"

4a. Identify any of your facilities under State Lands Commission jurisdiction, which are operated for the convenience and purpose of supplying petroleum products to a governmental agency. Identify the agency, the amount supplied to it annually, the rate for delivery, and the State Lands Commission lease number.

None

4b. Identify any of your facilities not under State Lands Commission jurisdiction which are operated for the con-

venience and purpose of supplying petroleum products to a governmental agency. Identify the agency, the facility, the amount supplied, and the rate for delivery.

None

4c. Identify whether the rental rates for the above leases vary from the rate for other petroleum products delivered at the same facility. If it does vary, identify the special rental rate.

Not applicable since we have none of the abovementioned leases.

EXHIBIT "E"

5a. Identify any of your pipeline facilities that are regulated by the ICC and/or the CPUC.

A. All of our pipeline facilities are regulated by the CPUC. We have an interest in "Standard Pacific Gas Line Incorporated" which is regulated by the FPC.

5b. Forward a copy of the tariff for each pipeline route identified above.

A. Not applicable.

5c. Upon what basis was the transportation rate in the tariff computed? What services are included in this transportation rate?

A. Not applicable.

EXHIBIT "F"

6. Identify any effect that a throughput rental rate will have on your pipeline operations.

A. Every navigable stream or body of water of any dimension within our service area would become an effective barrier against expansion of our pipeline operations.

B. Measuring devices would have to be installed to accurately determine the quantity of product transported across state lands. Both capital costs and operation and maintenance costs would be increased.

C. Use of existing underground storage areas and construction of new facilities would be discouraged since their use would require payment of very large additional taxes. All areas considered appropriate for underground storage are surrounded by state lands.

D. Since all throughput rental charges will be passed on directly to the consumer and since it is our obligation to the consumer as a public utility to furnish a quality product at the lowest possible rate, the immediate effect would be that:

(1) A study would be made of our present pipeline routing to determine if we could eliminate some crossings of state owned lands.

(2) Feasibility studies would be initiated to determine whether pressures, pipe sizes, and other quantitative factors could be used to eliminate some existing crossings of state owned lands.

E. The development of new gas storage facilities would be curtailed because of the additional pipeline transportation costs and the risk of spot shortages in winter would increase.

F. The circuitous route necessary in many instances to avoid crossing state owned lands would add to the initial costs of pipeline materials and construction.

G. The vastly increased cost of gas will further encourage business and homeowners to switch to other, dirty fuel. The impact on the environment of such a switch can only be determined after detailed environmental studies are completed; but the effect is bound to be significant. Therefore, an Environmental Impact

Report as required by Public Resources Code No. 27000 et seq. should be prepared for this project as proposed.

H. The throughput formula would impose a continuing charge to the utility for the privilege of occupying SLC property. Under PGandE's CPUC authorized tariffs, PGandE is only obliged to extend their operating distribution lines to serve individual applicants on the basis that satisfactory permanent rights are available to them without cost or condemnation. Therefore, any rental formula for use of SLC property using individual load factor would tend to become "rate making" since continuing rental charges for land rights for PGandE facilities to serve an individual customer would be passed on in kind to that customer to avoid imposing a burden on PGandE's other rate payers.

EXHIBIT "G"

7. Will you authorize the release of pertinent data contained in agreements between your company and any other company, corporation, or individual regarding the sale and transportation of petroleum and related products?

A. All of our agreements regarding the sale and transportation of petroleum and related products are on file with the CPUC.

RESPONSE OF GETTY OIL COMPANY

July 15, 1975

State of California
State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814

Attention: Mr. Gary R. Horn, Land Agent

Your file: Ref. W5125.8

Gentlemen:

In response to your letter and questionnaire of June 19, 1975, we have compiled the following answers:

1. a. Gaviota Marine Terminal

Location: On U. S. Highway 101, approximately 30 miles north of Santa Barbara.

S.L.C. Lease No. 550.1

Annual Volume of Petroleum Handled—108,000 barrels (1974)

1. b. Gaviota Marine Terminal

Annual Volume of Petroleum Products Handled Projected Through 1980

Due to uncertainties of production and transportation operations in the area of this installation, volumes to be handled are unknown at this time.

1. c. Proposed New Installations On or Across State Lands, Next 5 years—*None.*

2. Leases for Which We Pay Rent Based on Thruput—*None.*

3. a. Our Facilities Not on State Lands Commission Lands Which We Lease to Others on Thruput Basis—*None.*

4. a. Our Facilities on State Lands Commission Lands Operated to Supply Petroleum Products to a Governmental Agency—*None.*

4. b. Our Facilities Not on State Lands Commission Lands Operated to Supply Petroleum Products to a Governmental Agency—*None.*

4. c. Variation of Rental Rates Charged in 4 a and 4 b (above With Those Charged to Others—*Not Applicable.*

5. a. Our Pipeline Facilities Regulated by ICC or CPUC—*None.*

5. b. Request for Copy of Tariff—*Not Applicable.*

5. c. Basis for Computation of Tariff and Services Included in Tariff Rate—*Not Applicable.*

6. Effect of Thruput Rental Rate on Pipeline Operations

The immediate effect will be to increase the cost of transporting materials and will cause a subsequent price increase to the consumer.

7. Release of Terms of Agreements

Getty Oil Company cannot and will not voluntarily authorize the release of any pertinent data contained in agreements between the company and other companies since such data are considered by Getty Oil Company and, in all probability, all other companies, to be confidential competitive information, the disclosure of which may have adverse consequence to either party to such agreements and tend to injure them in the conduct of their business.

A representative of this company will be available to discuss the above, or other topics that you may wish to discuss, at the proposed meeting the latter part of July. Should you desire additional information prior to that meeting, please contact Mr. R. A. Griffith of this office.

Very truly yours,

/s/ J. M. Tharp, Jr.
J. M. Tharp, Jr.
for E. H. Shuler

EHS:jy

RESPONSE OF UNION OIL COMPANY OF CALIFORNIA

July 16, 1975

Mr. Gary R. Horn
Land Agent
State of California
State Lands Division
1807 13th Street
Sacramento, California 95814

Dear Mr. Horn:

Commission Leasing Rental Based on "Throughput"

Reference is made to your letter dated June 19, 1975, regarding the above subject matter, and to the questions asked in Attachment B thereof. The following are our replies to the questions:

1a. *Annual Volume of Petroleum Products—Existing State Lands Commission Leases:* Union Oil Company of California has five non-extractive leases with the State Lands Commission involving the flow of petroleum and petroleum products. The annual volume of flow for each lease is as follows:

> *Lease No. PRC 600.1, San Francisco Refinery Wharf, San Pablo Bay at Carquinez Strait, Contra Costa County*: Current annual volume of crude oil received is approximately 13,000,000 barrels; current annual volume of petroleum product shipped out is approximately 17,000,000 barrels. Total approximate current annual volume is 30,000,000 barrels.
>
> *Lease No. PRC 602.1, Ventura Marine Terminal, Ventura County:* Current annual volume of crude oil delivered to ships is approximately 7,300,000 barrels.
>
> *Lease No. PRC 3116.1, Pipelines Serving Platform Eva, Huntington Beach, Santa Monica Bay, Orange County:* Current annual volume transported to shore

is approximately 1,150,000 barrels of crude oil and 330,000 MCF of natural gas.

Lease No. PRC 4017.1, Pipelines Serving Federal Platforms A, B and Hillhouse, Dos Cuadras Field, Santa Barbara Channel, Santa Barbara County: Current annual volume transported to shore is approximately 14,000,000 barrels of crude oil and 4,940,000 MCF of natural gas.

Lease No. PRC 4849.1, Point Conception Barge Loading Facility, Cojo Bay, Santa Barbara County: Current annual volume of crude oil transported to barges is approximately 103,000 barrels.

1b. *Projections Through 1980:* It is not possible for Union to make firm projections of such volumes.

1c. *Plans For Additional Facilities During Next Five Years:* There are no firm plans for additional facilities during the next five years.

2. *Existing Leases Involving Throughput Rentals:* No throughput rentals are paid by Union for the use of any tide and submerged lands or any other lands in the State of California comparable to those leased by Union from the State Lands Commission. Throughput (wharfage) fees have been paid to the Ports of Los Angeles, San Diego, San Francisco, Stockton and Redwood City for the use of preferentially assigned wharves. These wharves have been constructed, and are owned and maintained by the Ports and are located within the confines of protected harbors where the port authorities have provided such amenities as breakwaters, dredged channels, surface transportation corridors and related facilities, and maintenance, dredging, fire protection and security, all for the benefit of the shippers. The effective current average wharfage paid by Union is $.013 per barrel of petroleum and petroleum products loaded to and from the wharves.

One unique lease has been granted to Union by the Port San Luis Harbor District, where Union owns and maintains only the wharf which it uses, within an enclosed breakwater-protected harbor. The wharf and adjacent mooring buoys are located within a 37-acre parcel of submerged land leased by the Port District to Union. The primary lease term is 25 years, from October 1, 1964, with term renewal options covering an additional 25 years. Annual rental is based on the volume of liquid petroleum and petroleum products loaded to and from the wharf, at the current rate of \$.00105 per barrel for the first 3.5 million barrels per year, and \$.000525 per barrel for the volume exceeding 3.5 million barrels. The current minimum annual rental is \$2,999.00. These charges are adjusted each five years by ratios corresponding to changes in the level of the U.S.B.L.S. National Wholesale Price Index, all commodities.

3a. *Land Leases to Others Involving Throughput Rentals:* None

4a. *Facilities Maintained for Governmental Agencies—SLC Lands:* None

4b. *Facilities Maintained for Governmental Agencies—Non-SLC Lands:* None

5a. 5b. 5c. *California Pipeline Facilities Regulated by the ICC and/or the CPUC:* None

6. *Effect of a Throughput Rental Rate on Union's Pipeline Operations:* The immediate effect of a throughput rental on Union's pipeline operations would likely be limited to an increase in pipeline transportation costs corresponding to the magnitude of the rental. Far greater long-run effects, on the other hand, could result because of the precedent which the throughput rental formula could establish with other parties from whom pipeline right of way privileges must be obtained. To the extent that the exces-

sive burden of such charges would continue to grow, a dislocation in the entire system of petroleum and petroleum products transportation could well result. An in-depth dissertation on the prospective economic and environmental effects of such a dislocation is beyond the scope of this type of letter.

7. *Pertinent Data Contained in Petroleum and Related Product Sale and Transportation Agreements:* Absent a more precise delineation of the particular type of data desired, we will reply "No" to this question.

It is hoped the foregoing information will assist you in your investigation.

Very truly yours,

/s/ W. H. Cotrel
W. H. Cotrel
Manager Property Services

WHC:jt

RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY

July 17, 1975

Mr. Gary R. Horn, Land Agent
State of California
State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814

SUBJECT: FILE REFERENCE W5125.8
COMMISSION LEASING RENTAL
BASED ON "THROUGHPUT"

Dear Mr. Horn:

Your letter dated June 19, 1975 requested San Diego Gas & Electric Company provide information needed for a more detailed investigation into a Commission proposal to base rental rates for pipelines which cross State-owned land on a "throughput" charge.

The following is the Company's response to Attachment "B" of the above letter:

1a. (A) *Encina Offshore Fuel Oil Terminal Berthing and Petroleum Transfer Facility*

Location: Pacific Ocean off the coast of Carlsbad, California.

Lease number: P.R.C. 791.1 (File W20335).

Annual Volume: 3,815,934 bbls (1974).

(B) *Gas Pipelines Crossing San Diego Bay*

Location: San Diego Bay between the cities of San Diego and Coronado.

Lease number: P.R.C. 4799.1 (File W20356).

Annual Volume (est.): 776,329 MCF (1974).

1b. (A) *Encina Mooring Facility*

1975	8,939,282 BBLS
1976	11,999,000 BBLS
1977	14,231,000 BBLS
1978	16,148,000 BBLS
1979	17,150,000 BBLS
1980	17,780,000 BBLS

(B) *San Diego Bay Crossing*

1975	803,500 MCF
1976	831,623 MCF
1977	860,730 MCF
1978	890,855 MCF
1979	922,035 MCF
1980	954,306 MCF

1c. We have no plans for the placement of *additional* pipeline facilities across land under State Lands Commission jurisdiction in the next five years. The Army Corps of Engineers is planning to dredge San Diego Bay starting in August, 1975. This action may cause us to repair or replace existing natural gas pipelines now traversing the bay.

2. Because of the inadequate depth of San Diego Bay, which can only accommodate barges and small or partially laden tankers, we are forced to periodically transport fuel oil from our Encina facility at Carlsbad to the San Diego Unified Port District's 24th Street Pier in National City, California.

The Port's docking and wharfage facilities are used in conjunction with an easement which the Company holds from the District, allowing for the construction, operation and maintenance of a pipeline on Port District property from the 24th Street Pier, approximately 1,500 feet easterly to land leased from the District on a cost per square foot per year basis and used for fuel oil storage.

The San Diego Unified Port District utilizes a tariff schedule for the use of their facilities, a copy of which is enclosed. We presently pay a "wharfage" tarif. of ¾¢ per

bbl of petroleum products off loaded from the pier, and a "dockage" charge based on the length of the vessel berthed or moored and its duration in port. The use of the facility constitutes consent by the user of all the terms, conditions, rules, regulations, rates and charges set forth therein.

The San Diego Gas & Electric Company has a *Fuel Oil Storage Agreement* with Waterfront Service, Inc., allowing for the storage of up to 90,000 bbls of fuel oil at their facility located at the San Diego Unified Port District's Tenth Avenue Terminal in San Diego, California. This facility is only used on an "as needed" basis. The Company pays $7,150 per month for the privilege of having 90,000 bbls of storage capacity available, plus 22.6¢ per bbl when fuel oil is actually stored at, or pumped through, their facility.

3a. None.

4a. None.

4b. None.

4c. Not applicable.

5a. All of our natural gas pipelines are regulated by the California Public Utilities Commission (CPUC) under General Order 112-C.

5b. Not applicable.

5c. Not applicable.

6. (A) *Encina Mooring Facility*—At this location, the total estimated annual costs for the proposed throughput charge (based on 1.6¢ per bbl) are as follows:

1975	$143,028
1976	$191,984
1977	$227,696
1978	$258,368
1979	$274,400
1980	$284,480

Since we are currently paying $13,662 annually with provision for periodic adjustment, the impact of this proposal would be the difference between the present rental scheme and the proposed throughput cost.

(B) *San Diego Bay Crossing*—At this location, the total costs for the proposed throughput charge (based on .9¢ per 6 MCF) are as follows:

1975	$1,205
1976	$1,247
1977	$1,291
1978	$1,336
1979	$1,383
1980	$1,431

Similarly, we are currently paying $754.03 annually to the State Lands Commission for two strips of tide and submerged land for public utility purposes. The impact of this proposal would be the difference between the present rental scheme and the proposed throughput cost.

Note the above increased rental costs would be imposed without any increase in services to the lessee or other value given by the State. This will increase operating costs by escalating the cost at each stage of petroleum processing as it crosses lands under State Lands Commission jurisdiction all the way from the wellhead to the final user.

C. M. Laffoon's April 25, 1975 letter to the Commission contains information which is pertinent to any further investigation of the "throughput" question. A copy is enclosed for incorporation into your study.

7. This question appears to be a request for a broad waiver by this firm of any privacy with respect to petroleum purchase, sale and transportation operations. Such a request seems to be inappropriate. Certain competitive aspects of these transactions are not "pertinent" to state land leasing. This is particularly true for a utility, which must in many cases import its oil from out of state to meet APCO mandated low-sulphur fuel requirements. Further-

more, the requested data would appear to be beyond the jurisdiction of the State Lands Commission. Inquiries of this type are performed by the CPUC and State Energy Commission pursuant to their regulatory functions. Full disclosure of the requested material is routinely made to those agencies. Lastly, even disclosures made to agencies with appropriate jurisdiction are made to the understanding that certain price and other trade secrets will not be made public. We have always maintained that, in order to protect our bargaining position in this competitive society, trade secrets on each phase of production, sale, storage and transportation of petroleum and related products must not be publicized. To do otherwise would certainly cause the cost of such commodities to rise and consequently require increases in gas and electric rates.

Much of the information requested is on file with the CPUC and is open to the public. However, to the extent that we have requested both the CPUC and State Energy Commission not to disclose price and certain other data on this matter, it would be inappropriate for us to release that data to the State Lands Commission or staff.

I hope the above information will be beneficial to your investigation and look forward to participating in the open discussion to be held with other utility companies, scheduled for July 22, 1975.

Sincerely,

/s/ R. D. Richardson, Supervisor
Governmental Right of Way

RESPONSE OF EXXON PIPELINE COMPANY OF CALIFORNIA

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PMS GARY R HORN, LAND AGENT, DLR
STATE LANDS DIVISION, STATE LAND COMMISSION, STATE OF CALIFORNIA, 1807 13TH ST
SACRAMENTO CA 95814

SINCE EXXON PIPELINE COMPANY OF CALIFORNIA PRESENTLY NEITHER OWNS NOR OPERATES ANY PIPELINE IN THE STATE OF CALIFORNIA OR ELSEWHERE, IT HAS NOT RESPONDED TO THE LIST OF QUESTIONS SUBMITTED WITH YOUR LETTER OF JUNE 19, 1975 AND IS NOT SENDING A REPRESENTATIVE TO THE MEETING CALLED BY YOU TO BE HELD AT 9:30 AM ON JULY 23, 1975 IN LONG BEACH

EXXON PIPELINE COMPANY OF CALIFORNIA MAY HEREAFTER OWN OR OPERATE PIPELINES ACROSS STATE-OWNED LANDS IN THE STATE OF CALIFORNIA AND FEELS VERY STRONGLY THAT ANY CONSIDERATION PAID TO THE STATE FOR THE NECESSARY EASEMENT SHOULD BE RELATED TO THE VALUE OF THE LAND AND SHOULD BE COMPUTED IN THE SAME MANNER AS THE CONSIDERATION PAID BY THE STATE AND/OR ITS POLITICAL SUBDIVISIONS FOR SIMILAR EASEMENT RIGHTS ACROSS PRIVATELY-OWNED LANDS ACROSS WHICH ITS/THERE PIPELINES ARE LAID A CONSIDERATION ARRIVED AT IN ANY OTHER WAY WOULD NECESSARILY BE ARBITRARY AND PROBABLY CONFISCATORY AND

UNCONSTITUTIONAL SINCE IT WOULD HAVE NO RELEVANCE TO THE RIGHTS GRANTED. IN CONCLUSION, FOR THE ABOVE REASONS YOU ARE URGED TO RECOMMEND THE ADOPTION OF RENTAL RATES RELATED TO THE VALUE OF THE LAND AFFECTED AS IS THE PRACTICE FOLLOWED THROUGHOUT THE UNITED STATES.

U J LEGRANGE, PRESIDENT, EXXON PIPELINE COMPANY OF CALIFORNIA

RESPONSE OF
STANDARD OIL COMPANY OF CALIFORNIA, WESTERN OPERATIONS, INC., and STANDARD PIPELINE COMPANY

July 21, 1975

Mr. Gary R. Horn
California State Lands Division
1807—13th Street
Sacramento, CA 95814

Dear Mr. Horn:

This is in reply to your letters of June 19, 1975, to Mr. E. J. Taaffe, Standard Oil Company of California, W.O.I., and to Standard Pipe Line Company.

Our responses to the questions in your Attachment B are enclosed herewith. I have assumed that your inquiries apply only to facilities and leases within the State of California.

I hope the information provided will be helpful.

Yours very truly,

/s/ J. T. BREWSTER

STANDARD OIL COMPANY OF CALIFORNIA, W.O.I.
and
STANDARD PIPE LINE COMPANY

Answers to Questions, Attachment B, State Lands Division Letter of June 19, 1975

1 a, b. Tabulation of State Lands Commission leases is attached. The volumes shown are approximate for the current period, except for the refinery related leases, PRC Nos. 236.1, 139.1, 4497.1, 2785.1, and 4707.1. The volumes for these facilities are forecast for the year 1977. We do not have reliable forecasts beyond 1977 due to the many uncertainties affecting the petroleum industry.

1 c. Standard has no present plans for additional facilities that would be located on or cross State lands within the next five years. Our Estero Bay Deepwater Terminal Project has been indefinitely postponed.

2. Standard has no leases for which rent is paid on the basis of throughput except for some service stations for which a gallonage charge is paid in addition to a base rental. This type of arrangement is normally made to fit special circumstances, such as at locations where business is highly seasonal. We do pay wharfage charges to California ports in accordance with the provisions of their tariffs.

3 a. We have certain agreements with others whereby they may use surplus pipeline capacity. Charges are made on a per-barrel basis. We also have certain exchange agreements whereby oil is received from others into a pipeline on exchange and oil is exchanged back to the originator at another location that may or may not be on the same pipeline. A differential is charged in such cases on a per-barrel basis.

4 a. None.

4 b, c. Occasionally products are sold to governmental agencies that may have been transported through pipelines or marine terminals. No rental charge is made. The transportation, of course, is considered in the determination of the selling price.

5 a, b. Standard Pipe Line Company is a common-carrier regulated by the California Public Utilities Commission. A copy of its tariff is attached.

5 c. The services included in the transportation rate are stated in the tariff. The present rate levels were established by order of the California Public Utilities Commission in 1964 and undoubtedly cover direct and indirect expenses, taxes, and an allowance for return on investment.

6. The throughput rates proposed by your office would increase the transportation cost of our crude oil, refined products, and natural gas by an estimated $3.5 million per year. The aggregate rentals would be approximately twenty-five times as great as the present charges. In the case of our products pipeline from Richmond Refinery to Sacramento (Leases PRC Nos. 3281.1, 3280.1, 3278.1, 3277.1, and 3279.1), the proposed throughput charges would approximately double the cost of transporting products to Sacramento.

7. No. The data contains information that is confidential and proprietary. A blanket authorization for its disclosure could affect the company competitively. Of course, we will consider any specific inquiries that may be made.

STANDARD OIL COMPANY OF CALIFORNIA
STANDARD PIPE LINE COMPANY
CALIFORNIA STATE LANDS COMMISSION LEASES

	Commodity	Approximate Volume	Remarks
PRC #2478.1 Estero Bay Marine Terminal, Morro Bay, California	Crude Oil	60,000 BPD	
PRC #236.1 Richmond Long Wharf and PRC #139.1 Point Orient Wharf, Richmond, California	Crude & Products:		
	Inbound	258,000 BPD	Estimated for 1977
	Outbound	73,000 BPD	Estimated for 1977
PRC #4497.1, #2785.1, #4707.1, Submarine Pipeline Terminals, El Segundo, California	Crude & Products:		
	Inbound	217,000 BPD	Estimated for 1977
	Outbound	19,000 BPD	Estimated for 1977
PRC #3394.1 Pipelines from Island Esther, San Pedro Bay, California	Crude Oil	4,040 BPD	
PRC #4270.1 Pipeline Crossings, Roaring River Slough and Grizzly Slough, Solano County, California	Natural Gas	5,400 MCFD	
	Gas Condensate	16 BPD	
PRC #3277.1, #3278.1, #3279.1, #3280.1, #3281.1 Pipeline Crossings of Montezuma Slough, Honker Bay, Sacramento River, Grizzly Slough, Roaring River Slough Richmond-Sacramento Products Pipeline	Products	9,000 BPD	
PRC #3978.1 Suisun Bay Gas and Condensate Pipelines	Gas	29,000 MCFD	Joint lease with Shell
	Condensate	28 BPD	Joint lease with Shell
PRC #4303.1 Ryer Island Gas and Condensate Pipelines, Suisun Bay		12,000 MCFD	Joint lease with Shell
		12 BPD	Joint lease with Shell

	Commodity	Approximate Volume	Remarks
PRC #3519.1 Waste Water Pipelines, Huntington Beach, California	Water		
PRC #2448.1, #2449.1 Crude & Products Terminal, Carpinteria, California	Crude Products	5,000 BPD 2,400 BPD	
PRC #4117.1 Scanlon—Richmond, California	None		No commodity movements
PRC #654.1 Petroleum Products Bulk Plant, Napa, California	None		No products move over State lands

NOTE: Above volumes are current unless noted otherwise.

STANDARD PIPE LINE COMPANY
SAN FRANCISCO, CALIFORNIA

PIPE LINE TARIFF NO. S-2

Naming Rates, Rules and Regulations for Transportation of Crude Petroleum.

Schedule of Rates

From	To	Rates per Barrel of 42 U.S. Gallons
KETTLEMAN SYSTEM:		
Kettleman Station	Estero Terminal (Ship's Rail)	6.9¢
Kettleman Station	Mile Post Fifteen and all connections between M.P. 15 and Kettleman Station	1.4¢
Kettleman Station	Lines of Other Companies at or adjacent to Station	1.0¢
Shandon Station	Estero Terminal (Ship's Rail)	4.2¢
Shandon Station	Kettleman Station	3.6¢
Mile Post Fifteen and all connections between M.P. 15 and Kettleman Station**	Kettleman Station	0.5¢
MIDWAY SYSTEM:		
Midway Station, or 27-G Station*	Strand	2.3¢
Midway Station, or 27-G Station	Lines of Other Companies at or adjacent to Station	1.0¢

*Same rate applies when oil is received by Carrier at Buena Vista Tank Farm.

**Pumping Service provided by Shipper.

GATHERING CHARGES

Where gathering service is performed a gathering charge of 2¢/bbl. of 42 U.S. gallons will be made, which includes delivery through the established lines and connections of carrier into containers or other facilities designated by the

shipper in the particular field. On through shipments to destination this charge will be in addition to the rates shown above.

Subject to the rules and regulations following, and to change without notice, except as otherwise provided by law.

RULES AND REGULATIONS

1. APPLICABILITY OF RATES

The transportation rates apply to the transportation of crude petroleum ("oil") of not less than 20 degrees A.P.I. gravity through the established Kettleman-Estero trunk line, and of not less than 14 degrees A.P.I. gravity through the established Midway-Strand trunk line, of the carrier within the State of California between the receiving and delivery points specified in the Tariff.

2. CARRIER'S RIGHT TO REFUSE CERTAIN OILS FOR CARRIAGE

Carrier may refuse to gather or carry any oil except good, marketable oil of the gravities above specified, properly settled and containing not more than 3 per cent of basic sediment, water, and other impurities, as ascertained by either the "Gasoline Test" or "Benzol Test" (A.S.T.M. method D-96, latest issue) at the option of the carrier. The same method of ascertaining the amount of water, sediment and other impurities will be used in the delivery as in the receipt of oil. Oil having qualities injurious to, or materially depreciating the value of, other oil in contact therewith, will not be received. If the oil tendered for transportation differs materially in character from that usually produced in the field and being transported therefrom by the carrier, it will be transported only upon such further terms and conditions that the carrier may prescribe.

The carrier may reject oil which is involved in litigation, or the ownership of which may be in dispute, or which may be encumbered by lien or charge of any kind, or any part

of which may not have been produced in conformity with State and/or Federal laws, including laws prohibiting waste, and/or the rules and regulations of any regulatory body in recognized control. The carrier may require that the shipper evidence his compliance with applicable laws and his perfect and unencumbered title, and/or post an indemnity bond to protect the carrier against all loss.

3. CARRIER NOT LIABLE FOR MIXING OF OILS IN TRANSIT

All oil transported will be subject to such consequences of mixing with other oil as are incident to the usual pipe line transportation.

Transportation will be effected with reasonable diligence, considering the quality of the oil, the distance of transportation, and other material elements.

4. DELIVERIES

Deliveries will be made, at the option of the carrier, in lots of not less than 40,000 barrels. Arrangements for date and time deliveries shall be made with carrier at least 5 days in advance. The carrier may refuse to accept oil for transportation unless satisfactory evidence is furnished that the shipper has made provision for prompt receipt thereof at destination. Upon failure on the part of the shipper to make such arrangements, or to take delivery as agreed, the carrier may, upon 24-hours' notice, require the shipper to take delivery of any or all of his oil in the carrier's system.

5. DEMURRAGE

Demurrage will be charged at the rate of 1/10 of 1 cent per barrel per day of 24 hours or fractional part thereof for any oil in the carrier's possession for more than 10 days, and at the rate of 3/10 of 1 cent per barrel for any oil in the carrier's possession for more than 30 days. Demurrage will be waived for such period of delay caused by carrier's inability to make delivery at the time proposed, but carrier will not in any way be liable for costs or loss incident to delay from any cause.

6. DEDUCTION FOR SHRINKAGE IN TRANSIT

Oil tendered for shipment must be gauged and tested by a representative of the carrier, and will be considered accepted for transportation when it is received into the facilities of the carrier. Transportation will be charged on the net oil received. Quantities will be computed from regularly compiled tank tables, and corrected to 60 degrees Fahrenheit in accordance with Table 7 of ASTM-IP Petroleum Measurement Tables, ASTM D-1250, in its latest revision, and deduction will be made for the full percentage of basic sediment, water and other impurities. The quantity of oil deliverable to the shipper at destination will be

From	To	Loss Allowance
Kettleman Station	Estero Terminal (Ship's Rail)	1.0%
Kettleman Station	Mile Post Fifteen, and all connections between M.P. 15 and Kettleman Station	0.5%
Kettleman Station	Lines of Other Companies at or adjacent to Station	0.5%**
Shandon Station	Estero Terminal (Ship's Rail)	1.0%
Shandon Station	Estero Terminal (Shipper's Tankage)	0.5%
Shandon Station	Kettleman Station	1.0%*
Mile Post Fifteen	Kettleman Station	0.5%*
Midway Station, or 27-G Station	Strand	1.0%
Midway Station, or 27-G Station	Lines of Other Companies at or adjacent to Station	0.5%**

Where gathering service is performed, loss allowance is 1%

*This constitutes full allowance in event the oil is delivered subsequently to lines of Other Companies at Kettleman Station.

**Does not apply if shipper takes delivery on basis of tank gauges of delivery tank at Station; in this event, loss allowance shall be "None".

the net oil received as computed above, less an allowance to be deducted by the carrier to cover evaporation and shrinkage during transportation, according to the following schedule:

7. CARRIER'S LIEN FOR CHARGES

The carrier shall have a lien on all oil received for transportation to secure the payment of all charges, including demurrage, and may withhold delivery of oil until such charges are paid. If such charges remain unpaid 10 days after demand has been made for payment, or if after due notice, the shipper shall fail to take oil at the point of destination, oil may be sold by the carrier or its representative at public auction at the office of the carrier in San Francisco, after publication for five successive days of notice in a newspaper published in said city of the time and place of sale and the quantity of oil to be sold. The proceeds of sale shall be applied to the payment of the charges of the carrier, and the balance, if any, shall be held for whosoever may be lawfully entitled thereto.

8. CARRIER'S LIABILITY FOR LOSS

Carrier shall not be liable for the results of fire, storm, flood, or act of God, strikes, riots, insurrection, rebellion, war, or act of the public enemy, quarantine or authority of law or any order, requisition or necessity of the government of the United States in time of war, or from any cause whatsoever, except its own direct negligence. In case of loss from any of such causes, other than the negligence of the carrier, after oil has been received for transportation and before the same has been delivered to the shipper, the shipper shall bear a loss in such proportion as the amount of his shipment is to all of the oil in the custody of the carrier at the time of such loss, and the shipper shall be entitled to have delivered only such portion of his shipment as may remain after a deduction of his due propor-

tion of such loss; except that oil in the carrier's tanks being segregated or accumulated for, and/or held subject to removal by the shipper shall be so held at shipper's sole risk.

9. CLAIMS FOR LOSS, DAMAGE, ETC.

Claims for loss, damage, or delay in connection with shipments must be made to the carrier in writing, fully substantiated with satisfactory evidence, within 60 days after loss or damage, or within 91 days after delay in delivery. Unless claims are so made and filed, the carrier shall be wholly released and discharged therefrom and shall not be liable therefor.

10. PRIORITY

Tenders for transportation shall become operative in the order in which they shall have been received, subject to the limitation that where a shipper enters into a contract with carrier to offer carrier for transportation a minimum daily quantity of oil for period of one year or longer, such shipper shall have a prior right to the transportation of said full minimum amount for the term of said contract; and tenders by other shippers will be transported in the remaining capacity ratably in proportion to their firm tenders. Shippers having contract rights to transportation of minimum daily quantities shall, for quantities tendered by them in excess of said minimum daily quantities, be considered as "other shippers."

RESPONSE OF ATLANTIC RICHFIELD COMPANY

California—State Lands Commission—Regulations
Your: W 5125.8

July 21, 1975

State of California
State Lands Division
1807 Thirteenth Street
Sacramento, California 90958

Attention: Mr. Gary R. Horn, Land Agent

Gentlemen:

In reply to the letter of Mr. Gary R. Horn of June 19, 1975, please be advised that we have considered your request to respond to the list of questions attached to Mr. Horn's letter. We find that many of the questions call for information already contained in the files of the State Lands Commission. In addition, a substantial number of the questions call for information which is either an inappropriate inquiry or requires the divulgence of information confidential and proprietary to Atlantic Richfield Company.

To be more specific, we believe that the State Lands Commission already has all information requested by Question 1a.

Questions 1b, 1c and 2 call for information that is not appropriate for any determination as to the validity of a rental charge based on throughput.

As to Question 3a, we do not believe there is an applicable relationship or a relevant comparison between a facility constructed with substantial capital expenditure by the owner and leased on a throughput basis, and unimproved land leased on such a basis.

As to Questions 4a, 4b and 4c, we fail to see the applicability of this to an investigation of a throughput rental charge.

As to Questions 5a, 5b and 5c, Atlantic Richfield has no pipelines in California that are regulated by the ICC or the CPUC.

As to Question 7, we fail to see the applicability of this question as to an investigation of rental on a throughput basis and we cannot, without a breach of confidentiality, release any such data.

Question 6 gets to the heart of the matter. A throughput rental will have the effect of substantially increasing costs in operating the pipeline and, ultimately, costs which the consumer must pay. A throughput formula has no logical basis in fact or in principle. It is purely arbitrary and capricious.

The throughput does not create a burden upon the land. Atlantic Richfield does and is prepared to pay a fair rental based upon an adequate and appropriate determination of the value of the land leased. However, this has little to do with the value of the commodity transported over the land. Our concern is not only the amount of the charge set up in the proposed schedules, but the right to exact any such charge itself. If the principle espoused by the State Lands Commission were adhered to by all cities and towns through which a pipeline in the course of its journey must travel, it is certainly within the realm of possibility, and indeed probability, that the cost per barrel in transporting oil would be astronomical. As stated, this would ultimately have to be absorbed by the consumer. The State Lands Commission, in advocating a rental based on throughput, exacerbates the situation in the supply of energy to the people of California.

We trust that common sense and fairness will prevail over any inclination to realize unwarranted economic gains for the State at the expense of the lessees and the consumers of California.

Yours very truly,

/s/ H. P. SMOLICH
H. P. Smolich—Manager
Right of Way and Land

RESPONSE OF PHILLIPS PETROLEUM COMPANY

July 21, 1975

State Lands Commission
Thru Put Rental
Your file: W-5125.8

Mr. Gary Horn
Land Agent
State Lands Division
1807 13th Street
Sacramento, California 95814

Gentlemen:

Attached is a listing of Phillips Petroleum Companys' answers to questions proposed by Attachment B of your letter of June 19, 1975.

/s/ J. R. MORLEY
J. R. Morley
Regional Manager

JRM:rl
Attachment

Answer to Attachment B
State Land's Letter of June 19, 1975

1 A

Location	State Lands Use #	Annual Volume of Product Wharves
Amorco Wharf .... Martinez, California	3453.1	22,346,000 BBls.
Avon Wharf .... Near Martinez, California	3454.1	13,026,000 BBLS.
Port Costa Wharf ...... Port Costa, California	2869.1	Not In Use At This Time
Sacramento Wharf ..... Sacramento, California	153.1 File: W-20299	Not In Use At This Time
Diablo Wharf .... Pittsburgh	2757.1	816,885 tons of bulk cargo (coke & caustic soda)
	Pipelines	
Pacheco Creek Crossing ..	331.1 File: W-20395	28,946,000 BBLS.
Ventura County La Conchita Shore ..... Site to Federal Offshore	3914.1	1,799,815 BBLS. 17,958 MCF Gas

1.B—No change
1.C—No plans for additional facilities
2. —None
3.A—None
4.A—None
4.B—None
4.C—None
5.A—None
5.B—N/A
5.C—N/A
6. —1. Throughput rental rates increasing rentals would make present operations less and less economical requiring examination and use of alternate ways of movement of product. For example:
   (a) Throughput rentals could cause a switch in the operation of federal offshore production into pipelines to production directly into ships moored outside state waters.
   (b) Throughput rental could cause an increase in use of other modes of transportation such as by railway tank car and truck with the resultant increases in hazards of spills and increased environmental problems.

   2. Throughput rental rates would unreasonably interfere with movement of products (an unreasonable burden on commerce).

   3. Throughput rental rates would be detrimental not only to Lessee but also to consumer purchasers of transported product.

   4. Throughput rental rates imposed by the State would be illegal.
7. —No

RESPONSE OF SOUTHERN PACIFIC PIPE LINES

July 21, 1975

Mr. Gary P. Horn
Land Agent
California State Lands Commission
1807 - 13th Street
Sacramento, California 95814

Dear Mr. Horn:

Please refer to your letter of June 19, 1975 wherein you have requested that certain information be forwarded to your office relative to this company's State Land leases and in conjunction with the "throughput" rental policy currently under discussion.

Outlined below, and attached hereto, are the answers to the questions outlined in "Attachment B" of your June 19, 1975 letter.

(1a, 1b & 1c) Please refer to Chart 1 attached, for information regarding the geographic location, lease number, description, current and projected throughput of products across each of this company's State Land leases. This is a current listing and we have no present plans for additional facilities to be located on or across lands under State Lands Commission jurisdiction within the next five years. The majority of SPPL's pipelines are multi-purpose in that they supply both commercial and military facilities. You will note that we have not shown the current and projected annual throughput for lines supplying only one military facility, nor have we broken out separately the military volumes handled by our multi-products lines. With the permission of U. S. Defense Fuel Supply, Washington, D.C., we will furnish your office with these figures.

(2, 3a) Not applicable.

(4a) Please refer to Chart 1 for requested information concerning SPPL's facilities under State Lands Commission jurisdiction, which are operated for the convenience and purpose of supplying petroleum products to governmental agencies, excluding volumes as noted above.

(4b) Please refer to Chart 2 for requested information regarding SPPL facilities, *not* under State Lands Commission jurisdiction, which operate for the purpose of supplying products to governmental agencies, excluding volumes as noted above.

(4c) The rate component for transportation for governmental agencies (military) and commercial shippers are the same to common points; however, total rates to final destination for movement of military products are usually higher due to additional services and facilities which are provided to the government, such as special lateral pipelines, storage tank rental, product quality control (filtration, laboratory equipment, chemists and buildings) and loading into trucks and trailers at certain locations.

(5a) The entire SPPL system is regulated by the ICC. In addition, commercial intrastate movements, as identified by the attached tariffs quotations, are regulated by the PUC.

(5b) Attached are copies of SPPL Local Pipeline Tariff #1, SPPL Local Pipeline Tariff #11-C, SPPL Local Pipeline Tariff #12, SPPL Section 530 (CPUC) Quotation #40 Amendment #1, SPPL Section 22 (ICC) Quotation #20 Amendment #1, SDPC with SPPL Local and Joint Pipeline Tariff #1-C, SDPC with SPPL Section 530 (CPUC) Quotation #10, SPPL with Calnev Pipeline Company Joint Pipeline Tariff #5-J, SPPL with Calnev Pipeline Company Section 530 (CPUC) Quotation #1 Amendment #4 and SPPL with Calnev Pipeline Company Section 22 (ICC) Quotation #1 Amendment #5.

(5c) SPPL transportation rates are computed for complete service between certain points identified in the tariffs and quotations attached. SPPL is a common carrier and public utility and owns no product. During transportation, product is in SPPL's care, custody and control.

In determining the levels of transportation rates, there are numerous factors taken into consideration, including; (1) a rate level low enough to move the traffic in competition with other modes of transportation, (2) reimbursement of all operating expenses, such as power, salaries and wages, maintenance, labor, ad valorem taxes, depreciation, supplies, rentals, fuel, outside services, employee benefits, overhead, etc.; (3) a reasonable and fair return on investment and (4) amortization of investment.

Services included in the transportation rates are: filtration, quality control, intransit storage, pumping, measurement, scheduling and delivery guarantee.

SPPL is a common carrier, filing tariffs with the Interstate Commerce Commission for interstate movements. For movements in California, SPPL is a public utility and common carrier, filing intrastate tariffs with the California Public Utility Commission.

(6) The proposed "throughput" charges would increase SPPL's current *annual* rental payments to California State Lands Commission by 12,240%. With these higher costs there are two alternatives: (1) take appropriate steps to discontinue service or (2) pass the increased costs to the shippers and ultimately to the public in general.

The proposed increased charges would place common carrier pipelines at a competitive disadvantage with other modes of transportation, such as trucks and barges. The result would be a tendency to shift transportation of products now moved by pipeline to these other modes, which

from the standpoint of the environment, safety and cost, are less desirable means of transportation.

The proposed charges would result in costs which would be completely out of proportion to other pipeline operating expenses, such as power, maintenance, labor and ad valorem taxes.

Furthermore, as we understand it, the proposed charges would be cumulative since it is possible that one barrel of petroleum product may pass over several State Lands Commission's leases from origin to destination. For example, if the increased charges become effective, product originating at a refinery on the north side of Carquinez Strait, would traverse two State Lands Commission's leases before reaching destination at Brisbane or the San Francisco International Airport, and incur lease charges of 1.2¢ per barrel across Carquinez Strait and 2.0¢ per barrel for San Francisco Bay, a total of 3.2¢ per barrel for this movement of 66 miles, or 70 percent of SPPL's present published tariff of 4.6¢ per barrel.

The State of California under the proposed charges would receive 6,000% more for the two leases than it receives today.

SPPL's total rental payment for the year 1974; including leases, franchises, licenses, etc. for all pipeline, terminal and other facilities, was $1,303,466.00. Should the "throughput" charge be approved, SPPL's annual rental payment for only four of its State Lands Commission leases would be approximately $1,318,000.00. It is easy to see the vast effect of the proposed program.

The increased charges based on "throughput" would establish a precedent with other lessors and franchise grantors along our 2,500 mile system, thus resulting in a dramatic increase in overall lease, franchise and other annual payments.

(7) Since SPPL is a common carrier and public utility, it does not have agreements with other companies, corporations, or individuals, regarding the sale and transportation of petroleum and related products.

Should further information be desired, please advise.

Sincerely yours,

/s/ B. K. Smith
B. K. Smith

CH

S.P.P.L. PIPELINE CROSSINGS OF CALIFORNIA STATE LANDS

(Questions 1a & 1b)

Line Sec. #	Lease	Size Line	From	To	Crossing Location	Curre Annu Thrup (1,000 b
2	1552.1	12″	Niland	Yuma	Colorado River, Imperial Co.	17,40
9	1876.1	10″	Brentwood	Stockton	Middle Riv., San Joaquin Co.	12,50
9	1875.1	10″	Brentwood	Stockton	Old River, Contra Costa-San Joaquin Co.'s	12,50
9	1877.1	10″	Stockton	Bradshaw	San Joaquin Riv. San Joaquin Co.	4,70
9	1862.1	10″	Sacramento	Roseville	American Riv.	14,10
56	1862.1	4″	Bradshaw	McClellan AFB	American Riv.	*
56	1862.1	3″	Bradshaw	McClellan AFB	American Riv.	*
9	1859.1	10″	Stockton	Bradshaw	Mokelumne Riv. San Joaquin Co.	4,70
8	1890.1	8″	Richmond	Concord	Walnut Creek Contra Costa Co.	6,20
62	2694.1	8″	Stockton	Castle AFB	Burns Cut off San Joaquin Co.	*
62	2697.1	8″	Stockton	Castle AFB	Stanislaus Riv. Stanislaus, San Joa. Co.	*
62	2693.1	8″	Stockton	Castle AFB	San Joaquin Riv. San Joaquin Co.	*
62	2696.1	8″	Stockton	Castle AFB	Tuolumne Riv. Stanislaus Co.	*
62	2695.1	8″	Stockton	Castle AFB	Merced Riv. Merced Co.	*
72	1903.1	8″	Benicia	Concord	Grayson Cr. Contra Costa Co.	12,50
72	1902.1	8″	Benicia	Concord	Walnut Cr. Contra Costa Co.	12,50
47	1902.1	8″	Concord	Travis AFB	Walnut Cr. Contra Costa Co.	*
8	1889.1	8″	Richmond	Concord	Diablo Creek Contra Costa Co.	6,20
64	2855.1	8″	Roseville	Chico	Feather River Sutter & Yuba Co's.	5,70

RT 1

GOVERNMENT AGENCIES SUPPLIED BY SPPL UNDER CALIF. STATE LANDS LEASE

(Question 4a)

Projected Annual Throughput (1,000 bbl.) 1976	1977	1978	1979	1980	Agency Name	**Delivery Rate (¢ per bbl.)
17,414	17,951	18,700	19,490	20,324	YU, LU, WM, DM	77.1, 66.9, 71.0, 73.0
13,775	14,179	14,740	15,330	15,949	CA, MT, MC	36.9, 32.4 32.4,
13,775	14,179	14,740	15,330	15,949	CA, MT, MC	36.9, 32.4 32.4
4,892	5,020	5,199	5,388	5,588	MT, MC	32.4, 32.4
14,419	14,623	14,901	15,186	15,477	BE, RE, FA	41.6, 65.9, 110.5
					MC	32.4
					MC	32.4
4,892	5,020	5,199	5,388	5,588	MT, MC	32.4, 32.4
2,525	2,525	2,525	2,525	2,525	OZ, BE, RE, FA, MT, MC, CA, TR	Gathering line No Add'l. Chg.
					CA	30.4 & 36.9
					CA	30.4 & 36.9
					CA	30.4 & 36.9
					CA	30.4 & 36.9
					CA	30.4 & 36.9
12,494	12,869	13,319	13,785	14,281	OZ, BE, RE, FA, MT, MC, CA, TR	Gathering line No Add'l. Chg.
12,494	12,869	13,319	13,785	14,281	OZ, BE, RE, FA, MT, MC, CA, TR	Gathering line No Add'l. Chg.
					TR	2.4
2,525	2,525	2,525	2,525	2,525	OZ, BE, RE, FA, MT, CA, TR	Gathering line No Add'l. Chg.
6,680	6,750	6,843	6,937	7,033	N/A	N/A

(Continued on following page)

CHART 1—(Co

S.P.P.L. PIPELINE CROSSINGS OF CALIFORNIA STATE LANDS

(Questions 1a & 1b)

Line Sec. #	Lease	Size Line	From	To	Crossing Location	Current Annual Thruput (1,000 bbl.)
25	4086.1	14"	Concord	West Sac.	Pacheco Creek Contra Costa Co.	23,100
27	4086.1	12"	Martinez	Concord	Pacheco Creek Contra Costa Co.	9,000
33	4086.1	12"	Martinez	Concord	Pacheco Creek Contra Costa Co.	12,000
25	3811.1	14"	Concord	West Sac.	Carquinez Str. Solano & Contra Costa County	23,100
95	3811.1	10"	Benicia	Amorco	Carquinez Str. Solano & Contra Costa Co.	7,500
103	3811.1	12"	Benicia	Concord	Carquinez Str. Solano & Contra Costa Co.	12,500
41	4028.1	10"	Richmond	Brisbane	S.F. Bay San Mateo Co.	7,000
42	4028.1	12"	Richmond	Brisbane	S.F. Bay San Mateo Co.	12,000
24	3611.1	10"	West Sact.	Bradshaw	Sac. River Sac. City	14,200
28	3611.1	10"	West Sact.	Bradshaw	Sac. River Sac. City	2,300
—	3773.1	N/A	(Wharf Site, No Products)		Sac. River Yolo Co.	

*NOTE: With the permission of U.S. Defense Fuel Supply, Washington, D.C., we wi

**BE—Beale AFB FA—Fallon NAAS MT—Math
CA—Castle AFB LU—Luke AFB OZ—Ozol N
DM—Davis Monthan AFB MC—McClellan AFB RE—Reno

ontinued)

Projected Annual Throughput (1,000 bbl.)					GOVERNMENT AGENCIES SUPPLIED BY SPPL UNDER CALIF. STATE LANDS LEASE (Question 4a)	
1976	1977	1978	1979	1980	Agency Name	**Delivery Rate (¢ per bbl.)
24,100	24,747	25,633	26,562	27,536	BE, RE, FA	41.6, 65.9, 110.5
9,000	9,270	9,595	9,931	10,289	N/A	N/A
12,000	12,360	12,793	13,241	13,718	N/A	N/A
24,108	24,747	25,633	26,562	27,536	BE, RE, FA	41.6, 65.9, 110.5
7,500	7,725	7,995	8,275	8,573	N/A	N/A
12,500	12,875	13,326	13,792	14,289	OZ, BE, RE, FA, MT, MC, CA, TR	Gathering line No Add'l. Chg.
6,934	7,046	7,198	7,354	7,514	N/A	N/A
7,621	7,740	7,896	8,053	8,214	N/A	N/A
14,419	14,623	14,901	15,186	15,477	BE, RE, FA	41.6, 65.9, 110.5
1,292	1,350	1,431	1,517	1,608	N/A	N/A
					N/A	N/A

ill furnish the Annual Barrel Supply to the Military Facilities.

er AFB TR—Travis AFB
Mil. Stg. WM—Williams AFB
Military YU—Yuma MCAS

RESPONSE OF
SOUTHERN CALIFORNIA EDISON COMPANY

July 22, 1975

State of California
State Lands Division
1807 13th Street
Sacramento, CA 95814

Attention: Gary R. Horn

Gentlemen:

Subject: Leasing Rental Based on Throughput Charge
Your File No. W 5125.8

Attached is information requested in your letter of June 19, 1975. The only facility that we have that is directly affected by your proposed throughput rental is our Mandalay Generating Station Offshore Fuel Oil Pipeline. The answers to your questions are as follows:

Question 1a—The Lease No. is 2180.1 and the facility is located near Oxnard. The annual volume of fuel oil utilized by this facility this year is 3.4 million barrels.

Question 1b—The annual volume projected through the year 1980 is:

1976	3.6	million	barrels
1977	3.4	"	"
1978	3.4	"	"
1979	3.6	"	"
1980	3.6	"	"

Note: Beginning January 1976, under long term contract, tankship deliveries of approximately 42 million barrels of fuel oil may pass through affected pipelines to produce utility fuels for Edison. Some of this fuel oil, produced by oil companies, will supply the fuel oil requirements of Mandalay Generating Station. This will involve moving fuel oil from refineries to offshore marine facilities to load tankers to transport the oil to Mandalay. This component of Edison's oil requirement will, therefore, be impacted three times by the proposed throughput charge. The first time when delivered to the refiners in the form of crude oil,

the second time when moved out of the refineries onto tankers for shipment to Mandalay in the form of fuel oil, and the third time when the fuel oil is off-loaded through the off-shore terminal at Mandalay. It is anticipated that the oil companies may pass through to Edison any tax or other government extraction of any kind levied against the crude oil products including the proposed throughput charge.

Question 1c—We have no additional facilities planned within the next five years.

Questions 2 through 5c do not apply to Edison.

Question 6—Throughput Rental Effect. Exclusive of any indirect charges previously mentioned which would be imposed by oil companies, the throughput charge on our Mandalay Facility would be $54,400 for the year 1975.

Question 7—Will you authorize the release of pertinent data? Edison would permit representatives of the State Lands Commission to review and inspect, during our office hours, the arrangements and agreements between Edison and any other company, corporation, or individual regarding the sale and transportation of petroleum and related products. If upon such review, your representative wished copies to be made for the Commission of any information from such agreements, we would be willing to make such copies, with the understanding that if the copies requested were voluminous, we would expect reimbursement of our cost of their reproduction.

As previously stated in my letter of May 2, 1975 to Mr. James F. Trout, Manager, Land Operations, the Southern California Edison Company is strongly opposed to the proposed throughput charge. We do not feel that it is a proper charge and it does not represent an accurate economic rate for use of vacant land. We do feel, however, that the 8% rate of return on the appraised value of the land, as proposed by the State, is not excessive or unreasonable.

Very truly yours,

/s/ P. B. Peecook

RESPONSE OF EXXON COMPANY, U.S.A.

July 23, 1975

In re: Commission Leasing Rental
Based on "Throughput"

Your File Reference: W 5125.8

California State Lands Division
1807 13th Street
Sacramento, California 95814

Attention: Mr. Gary R. Horn, Land Agent

Gentlemen:

In response to your letter of June 19, 1975 we are enclosing answers to your questions to Exxon Company, U.S.A., a division of Exxon Corporation, concerning the caption. We understand that separate responses will be forwarded to you by Exxon Pipeline Company.

We have attempted to answer each question completely and to the best of our knowledge. Our answers pertain to Exxon Company, U.S.A. operations in California.

All information set forth in our answers is confidential and is given in reliance upon Government Code, Section 11183.

Exxon Company, U.S.A. feels very strongly that any consideration paid to the State for pipeline leases should be related to the value of the land. A consideration arrived at in any other way would necessarily be arbitrary, confiscatory and unconstitutional since it would have no relevance to the rights granted. For these reasons, we recommend that rental rates be directly related to the value of the land affected.

Very truly yours,

/s/ D. G. Warner

DGW:MKN:kll
Enclosure as stated

Responses To State Lands Questionnaire

1a. We assume that this question does not pertain to petroleum products crossing the State Lands Commission lease from which they are produced. Upon this assumption, our answer is none.

1b. This does not apply in light of the above response.

1c. Exxon Corporation (of which Exxon Company, U.S.A. is a division) is presently constructing facilities to develop the Santa Ynez Unit located in Federal waters in the Santa Barbara Channel. Exxon Corporation and Exxon Pipeline Company of California jointly hold State Lands Commission Lease P.R.C. No. 4977.1 which grants them a right-of-way through State lands for the construction of a single point mooring facility, pipelines, and a power cable to be utilized in the production of the Unit. Exxon plans to construct the same when all necessary permits have been obtained.

2. Assuming that this question does not apply to city franchises, Exxon Company, U.S.A. does not pay rental on any leases in California on a throughput basis.

3a. Exxon Company, U.S.A. leases no pipeline facilities in the state of California to other parties on the basis of throughput.

4a. Exxon Company, U.S.A. does not operate any pipeline facilities under State Lands Commission jurisdiction for the convenience and purpose of supplying petroleum products to a governmental agency.

4b. To the best of our knowledge, the only pipeline facilities which Exxon Company, U.S.A. operates in California and which could be construed as being operated for the convenience and purpose of supplying a governmental agency are our refinery product pipelines at the Benicia refinery. Government owned or controlled vessels may from

time to time take delivery of petroleum products from Exxon's Benicia refinery through Exxon's product pipelines terminating at the most Westerly 1,000 feet of Pier 95. Said pipelines run along an easement granted to Exxon by Benicia Industries. No separate rental is paid for the easement although pier rental is paid by Exxon to Benicia Industries under the terms of the sublease covering the pier and the easement. No separate rental is paid on the pipelines.

4c. Inapplicable.

5a. Exxon Company, U.S.A. does not operate any pipeline facilities in California which are regulated by the Interstate Commerce Commission or by the California Public Utilities Commission.

5b and 5c. These do not apply in light of the above response.

6. A throughput rental rate would not affect any pipeline facilities in California now operated by Exxon Company, U.S.A.

7. This question is stated in terms so general that it would be very difficult to answer. We would have to judge each request for the release of pertinent information on the merits of that particular request.

RESPONSE OF EXXON PIPELINE COMPANY

July 24, 1975

Re: Commission Leasing Rental
Paid on Throughput

Mr. Gary R. Horn, Land Agent
State Lands Division
State Lands Commission
State of California
1807 13th Street
Sacramento, CA 95814

Dear Mr. Horn:

While this Company did not receive an inquiry from you, we have learned from representatives of other companies who have received such inquiries concerning pipelines located on State Lands and wish to voluntarily submit the following information:

1. Exxon Pipeline Company, a Delaware corporation, whose principal office is in Houston, Texas, has its principal operations in Texas, Louisiana, and Mississippi with smaller operations in the States of North Carolina, Florida, Alabama, Montana, and California. This Company owns and operates some 13,000 miles of pipeline of various sizes and insofar as we have been able to ascertain from a careful check of our records, this Company owns no pipelines on either publicly or privately owned lands which are subject to a lease or other agreement requiring the payment of an annual rental based on "throughput."

2. The overwhelming majority of the tracts of land crossed by our pipelines were crossed under a simple easement in perpetuity for which we paid a consideration at the time of purchase based upon the value of the easement acquired; and the value of the easement acquired was related to the value of the land. These easements require

no annual or other periodic payment of any kind. As the operator of common carrier pipelines, we are granted the right of eminent domain in all of the states in which we operate. Under such eminent domain statutes we are required to pay a consideration for the easements condemned based upon the current fair-market value of the rights acquired. In such condemnation proceedings, after the initial consideration is paid, no subsequent payments of an annual or periodic nature are required.

3. In the State of California, this Company owns and operates only one very short 20-inch pipeline used for the transportation of crude oil. This pipeline extends between the Tidewater refinery and the Exxon Company, U.S.A. refinery near San Benicia, California, and crosses lands owned by the State of California situated under Carquinez Strait located between Contra Costa and Solano Counties. Also located under Carquinez Strait, we have a 6-inch line of pipe which extends from the Exxon Company, U.S.A. tank farm at the refinery across Carquinez Strait where it ties into the 20-inch pipeline described above. This 6-inch line of pipe is used for the sole purpose of displacing the 20-inch pipeline with a light oil at the beginning of periods when the 20-inch pipeline is not in use. The heavy viscous crude oil transported in the 20-inch pipeline would congeal if left to stand in the pipeline when not in operation after being cooled by the cold waters of Carquinez Strait.

4. The following responses are made to questions asked in Attachment B to your letter sent to other companies:

1a. Carquinez Strait near San Benicia, California, Commission Lease No. 3811.1. Pipeline transports crude oil the volume of which varies from time to time. During the year 1974 this line handled 3,567,995 barrels.

1b. We have no way to arrive at a reliable projection of volumes through the above described pipeline during the period 1975 through 1980 since the volumes handled are dependent entirely upon facts and decisions not subject to our control.

1c. This Company has no present plans to construct any additional pipelines across Carquinez Strait during the next five years or at any other location in the State of California.

2. This Company presently has no existing leases for which it is currently paying rentals based on throughput. This answer applies to public agencies, port districts, as well as private parties.

3a. This Company has no facilities located either on State Lands or other public or private lands leased to parties on the basis of throughput.

4a. None.

4b. None.

4c. Inapplicable.

5a. None in the State of California.

5b. Inapplicable.

6. A rental rate based on throughput would have the effect of either (a) decreasing the profitability of the construction and operation of pipelines or (b) increasing the transportation charges to the shipper. This in turn would discourage the construction of new pipelines or increase the cost of petroleum products to the ultimate consumer.

7. This Company neither owns nor sells petroleum products. This Company's transportation of petroleum and petroleum products, as a common carrier, is public information covered by tariffs on file with the Interstate Commerce Commission. As to pipelines which

are not operated as a common carrier, transportation is provided under private contract, information about which could not be released without the concurrence of the other party to such contract.

I trust the information supplied herein will be helpful in your investigation and, I hope, will help to dissuade the Commission from attempting to establish rentals based on throughput.

Yours very truly,

/s/ Frank L. Heard, Jr.

RESPONSE OF DOW CHEMICAL U.S.A.

July 28, 1975
Mr. Gary R. Horn
Land Agent
State Lands Division
1807 Thirteenth Street
Sacramento, California 95814

Dear Mr. Horn:

This is in response to your recent questionnaire and request for information concerning Dow leases of rights of way for its pipelines across state lands and the impact on Dow's operations of the proposed rental rate schedule based on throughput.

Dow owns and operates two gas pipeline systems which delivers gas to our Pittsburg, California plant where this gas is used to produce chemical materials and to generate power and steam. We presently pay $933 per year to the State Lands Commission for leased rights of way for these pipelines. If the proposed rates based on throughput were to go into effect we estimate our costs would increase substantially.

Our Montezuma pipeline system, which gathers gas from fields in Solano and Yolo counties and delivers it to the Pittsburg plant via an 8-inch pipeline that crosses the San Joaquin and Sacramento rivers. We have a leased right of way from the State Lands Commission to cross the river with this line. This lease is PRC 4699.1. We have a grant of easement from the State Fish and Game Commission to cross lower Sherman Island with this line. This easement was obtained with a single one-time payment of $3,000. Our pipeline crossing the river is a buried one (55 feet depth) and it extends 9,484 feet. The line has a maxi-

mum carrying capacity of 35 million cubic feet per day of natural gas. Its present average utilization is about 10 million cubic feet per day.

Our present lease rental for a 30 feet wide right of way is $759.04 per year. Our costs would increase to $9,733 per year for this river crossing if the present average throughput of 10 million cubic feet per day continued. If we were required to pay an additional throughput tariff for that portion of the line (8,205 feet) that crosses Sherman Island, we estimate that we would be $12,167.

The second pipeline system owned by Dow and operated to serve our Pittsburg plant is known to us as our Sacramento River Gas System. This is an 8-inch line. It brings gas from the Dutch Slough area near Brentwood to our plant. We lease a San Joaquin River crossing (your PRC 3768.1) from Sherman Island to Dutch Slough. The Dutch Slough crossing is via a county bridge and is not leased from the State Lands Commission.

This San Joaquin River crossing is for an 8-inch line and our lease covers a 1,995 feet long right of way. This line carries five million cubic feet of gas per day and this is all that we foresee that this line will ever carry since wells in the Dutch Slough are losing their ability to produce gas.

Our present lease rental under PRC 3768.1 is $173.97 per year for a 30 feet wide right of way. The proposed rental based on throughput would raise our costs to $2,737.50 per year at its present flow rates.

We are proposing to construct a $500 millions petrochemicals plant in Solano County for the purpose of producing feedstocks to be moved under the Sacramento and San Joaquin Rivers to our Pittsburg plant. Environmental Impact Statements have been prepared and permits have

been applied for in connection with this project. We expect that three, perhaps four, 10-inch pipelines from Solano County would be required to handle these hydrocarbon feedstocks and that the route of these pipelines would parallel our present pipeline right of way that is described in your PRC 4699.1.

Our proposed Solano County facility could be described as a naptha cracker. It will process naptha, a petroleum product which has already undergone a stage of refining. This naptha will be brought to the Solano County site by ship. The naptha cracker will produce ethylene, propylene and hydrogen, which are the basic building blocks for Dow's petrochemical products. There will be considerable volumes of these gaseous materials moved from the Solano County naptha cracker to our Pittsburg site via the proposed pipelines. At this time we estimate these annual volumes to be 11 million cubic feet of ethylene, 2.7 million cubic feet of propylene and 5.8 million cubic feet of hydrogen.

If the proposed throughput formula were to be applied to these materials as well, then we would estimate our costs would be an additional $66,000 per year.

It would be our hope that a special classification for feedstock materials of this type could be considered, since the pipeline system merely connects one major chemical plant which happens to be separated into two parts by a river. There is an insufficient amount of land available at the Pittsburg site to locate the naptha cracker on the Pittsburg side of the river.

Cordially yours,
/s/ Jack
Jack Jones

Manager
Government and Community Relations

/fg

RESPONSE OF THE SEELEY COMPANY

July 28, 1975

Mr. William Northrup
Executive Officer
State Lands Commission
1020 Twelfth Street
Sacramento, California 95814

Dear Mr. Northrup:

It is my understanding that there is a proposal before the commission to change the basis for determining rentals for petroleum pipeline rights-of-way across State-owned property.

It seems certain that changing the rent structure to a throughput basis would result in increased costs to California users of petroleum products, increasing inflationary pressures and placing our industrial employers at a competitive disadvantage. With the present unemployment picture I don't see how California can afford to take any further action which would discourage industry from remaining in the State.

There is no apparent logic for changing the method of determining right-of-way rent from a fair return on the value of the land used to a throughput measurement basis. There is no comparison between a right-of-way under which the Lessee constructs, operates and maintains the improvements and wharfage when the port authority constructs and maintains the waterways, and provides support services.

I feel that it is important to the economic health of California that the State Lands Commission reject the proposed change in rental on petroleum pipeline rights-of-way.

Very truly yours,

THE SEELEY COMPANY
/s/ PETER W. MEYN
Peter W. Meyn

pWM:lw

SUPPLEMENTAL RESPONSE OF PACIFIC GAS & ELECTRIC COMPANY

July 29, 1975

Supplemental Information to the Long Beach Meeting on Proposed "Throughput" Charges. 28

State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814

Attention: Mr. Gary R. Horn, Land Agent

Gentlemen:

At the July 22, meeting in Long Beach, some questions were asked about certain of our proposed projects and existing facilities for which we promised additional information. These questions with their respective answers are:

1. What has happened to your proposal to use lands under SLC jursdiction to enlarge your off-shore tanker facility at Moss Landing?

We are presently in the process of answering the questions raised by the State Lands Commission as a result of a review of the draft environmental impact report for which the Commission is lead agency. The answers have been long in coming because, in some instances, they require field work and even additional permits before the work can be done, soil investigations, etc. We expect to have the questions answered by late summer or early fall. At which time, we will forward the answers to the SLC. A final decision to proceed with this project has not been made.

2. What would be the additional burden on your Company if the proposed "throughput" formula was applied to your fuel oil line crossing over SLC lands to supply your Pittsburg and Contra Costa Power Plants? The pro-

jected amount of low sulphur oil that would be transported by means of our fuel oil pipeline and the respective impact on our customers for each of the two SLC lands crossings for the years 1975 through 1985 is:

Year	Barrels	Schedule "B" Factor	Each Crossing Dollars	Total Impact Dollars
1977	15,000,000	$.008	$120,000	$240,000
1978	16,875,000	.008	$135,000	$270,000
1979	18,750,000	.008	$150,000	$300,000
1980	20,625,000	.008	$165,000	$330,000
1981	22,500,000	.008	$180,000	$360,000
1982	24,375,000	.008	$195,000	$390,000
1983	26,250,000	.008	$210,000	$420,000
1984	28,125,000	.008	$225,000	$450,000
1985	30,000,000	.008	$240,000	$480,000

Since there are two crossings on SLC lands, the total dollar impact for each year would be twice the amount shown in the table; the total tariff charges for 1977 would be $240,000.

3. How much fuel oil was off-loaded on State lands at Pittsburg Power Plant and what would be the burden on your company if the proposed "throughput" formula was applied?

Year	Barrels	Schedule "A" Factor	Dollars
1974	4,300,000	$.02	$ 86,000
1975	5,130,000	.02	102,600
1976	9,000,000	.02	180,000
1977	9,200,000	.02	184,000
1978	12,000,000	.02	240,000
1979	12,000,000	.02	240,000
1980	12,000,000	.02	240,000

The projected quantities of fuel oil off-loaded at Pittsburg Power Plant after 1976 would be subject to revision if the fuel oil pipeline also is supplying fuel oil to the power plant at that time.

4. In your agreement with Urich Oil Company, when do you take ownership of the fuel oil and why wasn't approval for your lease agreement obtained from the SLC?

The fuel oil that will be off-loaded at the Urich Oil Company facility at Martinez into four each 500,000 bbl. storage tanks will belong to PGandE. Urich Oil Company will be supplying us with marine wharf facilities and storage facilities together with all necessary appurtenances thereto and nothing more.

We are of the opinion that no written consent by the SLC was necessary prior to the agreement between Urich Oil Company and PGandE. The condition in the standard lease refers only to subleasing the land and reads as follows:

> "That the Lessee shall not transfer nor assign this agreement and shall not sublet said land nor any part thereof, except upon the prior written consent of the State first had and obtained."

Our agreement with Urich Oil Company deals only with facilities and product and does not involve the land. Therefore, assuming that Urich Oil Company has a standard SLC lease, we came to the aforestated conclusion.

If we can be of any further assistance, please call Elmer H. Dunstan, (415) 781-4211, extension 2462.

Very truly yours,

/s/ P. J. MATTHEWS
Supervisor of Permits and
Environmental Planning

EHDunstan:MZ

RESPONSE OF TEXACO INC.

July 31, 1975

File Ref.: W 5125.8

Mr. Gary R. Horn, Land Agent
State of California—State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814

Dear Sir:

In response to your letter of June 19, 1975 and Attachment B, the following information is furnished in answer to each of the questions:

1a. A. *P.R.C. 4017.1—Tract 402 (OCS-P-0241).* Texaco Inc. has an undivided 17½% interest in pipeline serving P.R.C. 4017.1, which Union Oil operates and will report on pipeline easements covering this lease.

B. *P.R.C. 2725.1—Anita Lease, Platform Herman.* No production at this time.

C. *P.R.C. 2206.1—R/W 5027, Jade Lease Platform Herman.* A section of our line to shore crosses an adjacent ARCO State Lands lease P.R.C. 2642.1. The State granted Texaco Inc. a "paid-up" one-time consideration $5,650.19; Filing Fee $105 ($75 refunded); Term 49 years, issued September 29, 1968.

D. *P.R.C. 2763.1—R/W 5512* — Known as Texaco's Morro Bay Marine Terminal. Acquired June 16, 1961, 15 year term with option to renew two 10 year periods. Covers approximately 167 plus or minus acres offshore mooring area. Two ten inch 3590 ft. submarine pipelines. Average thruput—244,000 barrels per year.

1b. The estimated projection on Morro Bay is as follows:

1976—222,000
1977—224,000
1978—226,000
1979—228,000
1980—230,000

1c. No immediate plans for additional facilities on State Lands.

2. Existing lease (agreements) under which we are paying rent based on thruput in State of California:

A. *San Jose, Ca. Pipeline Terminal* — Operating Agreement with Southern Pacific Pipe Lines; effective 1/1/74, for five years and continuous thereafter until cancelled by either party on 60 days' notice.
Rent: 6.9¢/Bbl., based on product delivered by SPPL to Texaco.

B. *Imperial, Ca. Pipeline Terminal* — Operating Agreement with SPPL
Effective 1/1/74 for five years and continuous thereafter until cancelled by either party.

Rent: 11¢/Bbl. based on product delivered by SPPL to Texaco.

C. *Sacramento, Ca. Pipeline Terminal* — Operating Agreement with SPPL
Effective 9/16/68. Continuous until cancelled by either party on 6-month written notice.
Rent: 7¢/Bbl. on product delivered by SPPL to Texaco.

D. *Barstow, Ca. Pipeline Terminal* — Vapor Disposal Agreement with Calnev.
Effective: 1/1/72 for one year and thereafter year to year until cancelled.
Rent: 3¢/Bbl. for each barrel gasoline delivered to Texaco by Calnev.

E. *Colton, Ca. Pipeline Terminal* — Vapor Disposal Agreement with SPPL.

Effective: 1/1/72 for ten years and continuous thereafter until cancelled by either party on one year's notice.

Rent: 1.4¢/Bbl., for each barrel of gasoline delivered by SPPL to Texaco.

F. *Redwood City Port with Dock* — Leased from Port Commissioners, city of Redwood City. Nine acres at $225 per month, plus wharfage fee — $0.01 per bbl. (Jan.-April) and $0.015 per bbl. (May-Dec.) 1974 figures.

G. *Long Beach Harbor*

Texaco Marine Terminal 10.82 acres. Rental 6% return on appraised value, sq. ft., 40 year term. Current thruput charges average $0.023 per barrel.

3a. Lessee — Douglas Oil Company. Area of Lease — Pipeline between Continental Oil Co. Grubb Lease, north of Highway 101, west of San Miguelite Road and Shell Oil Company's Gosnell Lease, east of North Ventura Avenue. 29,741 ft. of six inch pipeline. Subject to 90 day termination by either party. Rental rate — $0.03/Bbl.

4a. Texaco Inc. has no such facilities.

4b. Texaco Inc. has no such facilities.

4c. Not applicablb, since negative answers were given for 4a and 4b.

5a. Texaco Inc. does not have any pipeline facilities regulated by the ICC or CPUC, in the State of California.

5b. No tariffs published.

5c. Not applicable.

6. Increase cost of operations and could cause review of possible alternates.

7. As we understand, an affirmative response to this question would entail advance authorization to release confidential and proprietary information which we are not prepared to divulge at this time. However, we will take under advisement any further request for specific information which is related to your investigation.

Yours very truly,

TEXACO Inc.
By /s/ D. L. Sedgwick
Vice President

DAS-mc

RESPONSE OF SOUTHERN CALIFORNIA GAS COMPANY

August 18, 1975

State of California
State Lands Commission
State Lands Division
1807 13th Street
Sacramento, California 95814

Attention: Mr. Gary Horn
Land Agent

Enclosed are the answers to your questionnaire. I am sorry it has taken so long to respond, but some of the people who wanted to review the answers have been on vacation.

Please keep me informed of the progress on the new fee consideration, and if you have any questions please call me.

/s/ Lloyd A. Ray
Supervisor of Rights
of Way Procedures

LAR:mn
Enclosures

Attachment B Answers

Question 1a.

State Lands Lease No.	Geographic Location	Company Line and Right of Way No.	Annual Volume
2533.1 (expires 4-28-2009)	Colorado River, Needles	Line 235 235-1.1	240.2 Billion cu. ft.
1802.1 (expires 10-15-2005)	Colorado River, Topock	Line 3000 R/W 8410	207.5 Billion cu. ft.
3642.1 (expires 12-19-1976)	Colorado River, Blythe	Line 2000 R/W 27,059	389.7 Billion cu. ft.

The following are School Lands:

3643.2 (expires 12-19-1976)	Section 36, T 6 S, R 20 E, S.B.B. & M.	Line 2000 R/W 8011-B	This is a continuation of the line above Lease No. 3642.1
1815.2	Section 36, T 8 N, R 7 E, S.B.B. & M.	Line 2000 R/W 18,503	
1814.2	Section 16, T 7 N, R 23 E, S.B.B. & M.	Line 3000 R/W 18,507	This is a continuation of the line above Lease No. 1802.1
1826.2	Section 25, T 7 N, R 13 E, S.B.B. & M.	Line 3000 R/W 18,511	

Question 1b.

Colorado River Needles Line 235 will have an anticipated flow of *98.0 Billion cu. ft. in 1980.

Colorado River Needles Line 3000 will have an anticipated flow of *180.0 Billion cu. ft. in 1980.

Colorado River Blythe Line 2000 will have an anticipated flow of *190.0 Billion cu. ft. in 1980.

Question 1c.

Potential LNG unloading site offshore deep water, Port Hueneme area.

Question 2.

We presently do not have any leases where easement charges are based on throughput.

Question 3a.

None

Question 4a.

None

Question 4b.

This question would be impossible to answer. *All* government installations in our serving area have their own service and metering facilities. The rates are filed with the C.P.U.C.

Question 4c.

No variance of rates. The applicable rate as filed with the C.P.U.C. will prevail.

Question 5a.

All of our pipelines and facilities fall under the jurisdiction of C.P.U.C.

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*These estimated calculations are based on present known supplies.

Question 5b.

No answer. Does not apply.

Question 5c.

No answer. Does not apply.

Question 6.

The 1976 renewal for Line 2000 in Blythe will increase our costs from $780 for 15 years to an annual cost of $360,000.

The estimated costs for unloading the LNG at Oxnard (Port Hueneme) will cost $306,600.

Question 7.

Upon request we will review and determine at that time what data and/or agreements can be released that are not already a matter of Public Record.

RESPONSE OF SHELL OIL COMPANY

October 10, 1975

Mr. Gary R. Horn
Land Agent
State Lands Commission
1807 13th Street
Sacramento, California 95814

Dear Mr. Horn:

This has reference to your letter of June 19, 1975, File W 5125.1, concerning questions posed to Shell Oil Company on the subject Commission Leasing Rental based on "throughput".

We regret your June 19 letter was misdirected to one of Shell's field offices and did not come to our attention until recently.

Attached is Shell's response to the questions raised in Attachment B to your letter. We have attempted to answer them to the best of our ability based upon our present knowledge of Shell's present activity and future plans.

Please especially bear in mind our comments concerning Question 7 regarding assurance of adequate confidentiality before release of pertinent data.

If we can be of further assistance, please let us know.

Yours very truly,

/s/ W. J. GRILLOS
Manager, T&S Pipe Lines—
West Coast Division

1a. Attachment I identifies the geographic area, State Lands Commission lease number, and the estimated annual volume of petroleum products crossing lands under the SLC's jurisdiction insofar as it leases to Shell Oil Company are concerned. The volumes shown are based upon actual figures for the first three months of 1975 projected at the same rate for the entire calendar year.

1b. Due to uncertainties under present and future federal and state statutes and regulations, in the economy, and in our own operations, no meaningful forecast can be made as to projected volumes through 1980.

1c. For the same reasons enumerated in 1.b above, we cannot project additional facilities which might come under State Lands Commission jurisdiction within the next five years. However, Shell does have one current project to transport low quality natural gas from the Sacramento area to Shell's Martinez refinery. Shell has applied to the California State Lands Commission for the necessary permits. Attachment I does not include the details as this application is not final.

2. We have no ground leases (i.e., leases where the lessee is given no right to use improvements owned by the lessor) occupied by any of our pipeline facilities, for which we are currently paying rent based on throughput. We do, however, pay dock fees to the Port of Los Angeles based on throughput of petroleum products unloaded from vessels at dock facilities owned by the Port. These wharfage charges, however, are covered by a published tariff (refer to Item 415 A-31, Port of Los Angeles Tariff No. 3), and are an acknowledged and equitable way for the Port to recover from the various users of such facilities a reasonable rate of return on the Port's significant capital investment therein. We also pay throughput charges to the City and County of San Francisco where our lease gives us the right to use the lessor's wharf facilities.

3a. The substance of the questions posed herein relates to land usage for pipeline and related purposes, so we have assumed that the reference to facilities in this question is intended to refer to leases of land rather than improvements or facilities. Shell has no California ground leases to third parties based on throughputs.

4a. Shell Oil Company has no facilities under State Lands Commission jurisdiction which are operated solely for the convenience and purpose of supplying petroleum products to a governmental agency, although all of them have been or are involved to some degree in handling product supplied on occasion to a government agency or used to manufacture such product.

4b. Shell Oil Company has no facilities not under SLC jurisdiction which are operated solely for the convenience and purpose of supplying petroleum products to a governmental agency. As previously stated in 4a above, however, virtually all of our facilities have been or are involved to some degree in handling product supplied on occasion to a governmental agency or used to manufacture such product.

4c. We do not understand this question.

5a. Shell Oil Company has no pipeline facilities in California regulated by the ICC and/or the CPUC.

5b. Not applicable.

5c. Not applicable.

6. A throughput rental rate of the magnitude proposed would have the immediate effect of increasing our pipeline operations cost in California by an estimated $800,000 annually—a cost that will ultimately be borne by the consumer, largely Californians. Further, we have many more leases with other governmental entities, such as cities and counties, as well as private landowners, than with the State Lands Commission, and the imposition of a throughput rental rate for pipeline operations across State Lands could lead such entities to demand the same terms in any future negotiations for new leases or renewal of existing

leases. Such an occurrence could increase our costs of operation by several millions of dollars per annum—a cost, as previously stated, which would ultimately have to be borne by the consumer.

7. Because we regard our agreements with other parties as confidential, our policy is against voluntary disclosure of any information concerning them. Whether or not we would make exception to that policy would depend on the nature of the particular information requested, and the assurances given for preservation of its confidentiality.

Attachment I

Summary of Existing State Land Commission Agreements

System	Permit	Area	Facility	Present Throughput
Ryer Island Gas Line			12" P/L	28 MMCFD
(Suisun Bay)	PRC 3978.1 dated 5-1-68	12,789' x 25'	4" P/L	40 b/d
Ryer Island Gas Line			4" P/L	4 MMCFD
(Suisun Bay)	PRC 4303.1 dated 8-28-69	6,211' x 25'	3" P/L	
Bay Area Prods. Line				
(San Francisco Bay)	PRC 3291.1 dated 4-29-65	12,500' x 50'	10" P/L	16,354 b/d
Martinez Refinery	PRC 4908.1 dated 8-1-74	20 ± Acs.	Wharf & 18 P/L	99,726 b/d

Note: Estimated thruputs based on January thru March 1975 averages.

STATE LANDS COMMISSION MEMORANDUM

DATED JULY 18, 1975

JAMES F. TROUT, Manager
Land Operations
via
1. L. L. Patton
2. L. H. Grimes

July 18, 1975

W 5125.1

STATUS OF THROUGHPUT RENTAL PROJECT

As of this date we have responses to our questionnaire from P. G. & E., Holly Corporation (Ozol Terminal) and Burmah Oil and Gas Company. I have received telephone calls from most of the companies who received the questionnaire, advising me that they were working on responses and would have something for us within a week or two.

In response to information received from P. G. & E., Jim Fiack and I visited the Port of San Francisco offices on Thursday, July 17th. We spoke with Mr. Harry J. Thiemann, Commercial Property Manager and his assistant, Mr. Reamers. According to information supplied by P. G. & E., the Port of San Francisco charges them a wharfage fee of 35¢ per ton (long) of fuel oil used in the Hunters Point and Petrero power plants. Our visit to the port was to confirm what services or benefits the port provided for the 35¢ wharfage fee.

Mr. Thiemann stated that both wharves were built by P. G. & E. (the Hunters Point facility was a trespass for some years). P. G. & E. maintains both sites without assistance from the Port of San Francisco. Mr. Thiemann stated that the port provides no benefits or services to P. G. & E. for either wharf facility. In addition to the 35¢ per ton wharfage fee, the port rents the wharf site to P. G. & E. for 2¢ per square foot per month (4,091 sq. ft.

m/l), plus a dockage fee in accordance with the published tariff.

In sum, it appears that the Port/P. G. & E. leases for the Hunters Point and Potrero wharves are identical situations under which the State Lands Commission administers its lands. The port now collects a "throughput" charge of approximately 5¢ per barrel for no services or benefits provided except the terminal site. We will explore this further with P. G. & E. at our upcoming meeting.

Meetings have been arranged with the utility companies (July 22, 1975, 1:30 p.m. Long Beach Office of the SLD); pipeline companies (July 23, 1975, 9:30 a.m., Long Beach Office of the SLD); W.O.G.A. and oil companies (July 31, 1975, 9:30 a.m., Office of the Attorney General in Los Angeles). We had hoped to have most of the responses before the meeting; however, it appears that most of the responses will be hand carried to the meetings.

Jim Fiack is now looking into the economic impact of the throughput rental on the rate-payers of the utilities. This information can only be developed after the meetings are held and the questionnaire responses analyzed.

I am available to discuss the details of the project at any time.

G. R. HORN
Land Agent

MATERIAL PROVIDED BY WESTERN OIL & GAS ASSOCIATION AT MEETING OF JULY 31, 1975 (1ST ITEM)

SUMMARY OF NON-EXTRACTIVE LEASES—WOGA COMPANIES

(Involving Flow of Petroleum and Petroleum Products)
(Excluding 49-Year Leases)

	Marine Terminals	Pipeline Rights of Way	Total
Number of Leases	18	21	39
Current Annual Rental	$ 231,000	$ 56,000	$ 287,000
New Minimum Annual Rental	355,000	86,000	441,000
Proposed Annual Throughput Rental (Based on Current Volumes)	5,821,000	2,348,000	8,169,000
Multiple Portion	1,400,000	800,000	2,200,000
Marine Terminals Investment and Expense Data:			
Gross Investment	$35,000,000		
Current Replacement Cost	128,000,000		
Annual Maintenance Cost	2,000,000		
Annual Dredging Cost	1,000,000		

MATERIAL PROVIDED BY WESTERN OIL & GAS ASSOCIATION AT MEETING OF JULY 31, 1975 (2D ITEM)

Build-Up of Throughput Rentals

	Cumulative Totals		
Year	Marine Terminals	Pipeline Rights of Way	Totals
1975	$ 82,000	$ [illegible]	$[illegible]
1976	1,266,000	974,000	[illegible]
1977	3,514,000	1,506,000	5,020,000
1978	3,524,000	1,888,000	[illegible]
1979	4,429,000	1,916,000	[illegible]
1980	4,429,000	[illegible]	[illegible]
1981	4,429,000	2,319,000	6,748,000
1982	5,132,000	2,319,000	7,451,000
1983	5,132,000	2,348,000	7,480,000
1984	5,495,000	2,348,000	7,843,000
1985	5,795,000	2,348,000	8,143,000
1986	5,795,000	2,348,000	8,143,000
1987	5,795,000	2,348,000	8,143,000
1988	5,821,000	2,348,000	8,169,000

MATERIAL PROVIDED BY
WESTERN OIL & GAS ASSOCIATION
AT MEETING OF JULY 31, 1975 (3D ITEM)

Salient Points Regarding Major California Ports

1. Rental for industrial sites leased from the ports is based on a return (e.g., 6%, 8% or 9%) on the appraised value of the land. No throughput rentals have been reported.

2. Besides income from the rental of land, the ports also receive income from wharfage fees levied against cargo transported across their docks, dockage fees levied against ships using the docks, and other similar fees for services and facilities provided by the ports.

3. The income derived by the ports is used to offset their substantial operating expenses and to recapture their substantial investment in port-owned facilities. An attempt to make a rate of return of roughly 1% on their investment has been mentioned.

4. Offsetting the need to derive income for the reasons noted above is the need for each port to remain competitive with other ports, which becomes another factor in determining their wharfage, dockage and other fees.

5. An informal control over the level of fees is maintained by the California Association of Port Authorities, which seeks, to some extent, to achieve a general uniformity of fees among its member ports. Moreover, all fee schedules adopted by the ports must have the approval of the Federal Maritime Commission.

STATEMENT BY
SOUTHERN CALIFORNIA GAS COMPANY
DATED APRIL 21, 1976

Southern California Gas Company
Statement in Opposition to
Proposed Amendments to Title 2,
California Administrative Code,
Article 2. Wednesday, April 21, 1976

I am Reins J. Corbeil, Manager of Environmental Affairs for the Southern California Gas Company. The Southern California Gas Company is an investor-owned natural gas utility serving a population of over 11 million in southern California.

At public hearings held last year on an earlier version of the proposed changes to the Commission's rental regulations, we expressed our opposition to certain of the amendments. We were opposed at that time to provisions relating to computing rental rates based upon the volume of commodities passing over State lands. Our detailed statement defining the basis for our opposition to the "throughput" concept was made on May 2, 1975 in Long Beach.

This latest version of proposed changes to Title 2, California Administrative Code, Article 2, again embodies provisions for rental fees for industrial and right-of-way leases based upon throughput volume. Conspicuously absent in this version of the proposed amendments are the fee schedules contained in the earlier version of the proposed changes.

We continue to be opposed to the "throughput" concept for the same reasons expressed in our previous statement of record. I feel it is important to briefly reiterate our major concerns.

We believe that the Commission by adopting, the "throughput" charge provision, runs a serious risk of dis-

tablishing a dangerous precedent for other governmental jurisdictions to follow. The large majority of natural gas consumed in southern California is imported from out of state. Transmission pipelines delivering natural gas to southern California traverse not only lands within the jurisdiction of other states, but cross numerous areas within California which are under federal and local government jurisdictions. If these other governmental authorities were to adopt similar provisions for "throughput" charges in their lease and right-of-way agreements, Californians could well be burdened with inordinate costs for which they receive no benefit. Clearly the implications of this precedent setting provision are significant.

Next we feel that rental fees assessed by the State Lands Commission based upon throughput volumes have no correlation whatsoever to services rendered by the State. We can find no rationale for basing annual rental fees on throughput volumes for leases of unimproved lands where the State has made no capital expenditures which need be amortized nor where any operational or maintenance costs are incurred. The only rational and correct method for computing the annual lease fee for unimproved land is on the basis of the appraised value of the land.

Further, we are unconvinced that the provisions of the proposed changes will exclude multiple charges being assessed by the State on identical commodity volumes. Section 2007. (b) (1) of the proposed amendments provides that multiple charges will not be imposed on an "identical commodity for passage over the same State land over which it is again passing, provided the commodity is still in the same ownership . . . " Since California gas utilities frequently interchange gas supplies, these volumes could have repeat "passage over the same State land", resulting in multiple charges. In addition multiple charges would occur when the identical commodity crosses State lands at

more than one location under the same or different ownership.

For all the reasons given we feel that the "throughput" charge concept applied to leases of State lands is not in the best interest of the citizens of this State. It must be realized that "throughput" charges imposed upon the public utilities will be passed on to the utility customers. This occurring at a time when every effort is being made to compensate for spiraling energy costs.

The Southern California Gas Company urges the State Lands Commission to reject the "throughput" charge concept and continue to use their present methods for calculating annual rental fees.

STATEMENT BY F. R. HENREKIN DATED APRIL 21, 1976

Statement to the State Lands Commission
April 21, 1976

Mr. Chairman and Members of the Commission

Your agency are presently considering changes to the regulations governing the rental rates for pipelines passing over state lands.

It is proposed that rentals will be based upon the volume of commodities passing over state lands. We are opposed to the imposition of this proposed rate schedule.

California presently has a very unfavorable business climate and a serious unemployment problem. We are in competition with other states to locate job producing industry and the imposition of these additional rental costs will be a further deterrent to economic development in California. We cannot continue to impose additional costs upon business and expect to attract new firms who will produce jobs for California.

Through the remainder of this decade there will be twice as many people reaching age 20 and entering California's labor force as people leaving the job market by retirement, not taking immigration into account. It means that the state's economy must produce 170,000 new jobs annually just to stay even. Actions like this increasing the cost of doing business will be a further restraint to industrial and business growth and job opportunities in California and should be carefully evaluated. The additional costs cannot be absorbed by California firms and must be passed on as a cost of doing business. This will increase the cost of merchandise or services and the consumer will pay the cost. It is in reality an indirect tax.

F. R. Henrekin
Industrial Development
Consultant, Solano County
Industrial Development Agency

STATEMENT BY DEPARTMENT OF DEFENSE MAILED APRIL 20, 1976

Before the State Lands Commission
of the State of California State Lands Division
Sacramento, California 95814

File No. W 5125.8

Proposed Changes to the Commission's Rental Regulations for Pipeline Rights of Way—2 Cal. Admin. Code, Sections 2006-2007—Volume of Commodity Rates

Comments of the United States Department of Defense

Comes now the Secretary of the Army, through duly authorized counsel on behalf of the United States Department of Defense (DOD) and files the following comments in the above-styled case.

The Interest of the Department of Defense

In its efforts to meet the nation's defense requirements, the Department of Defense has established, maintains and operates numerous military installations throughout the United States and within the State of California. In the State of California and western Nevada alone there are nine major air force bases utilizing jet fuels and other petroleum products which pass through pipelines located in the State of California. DOD estimates that some 9,285,000 barrels of petroleum products are shipped annually to its military installations through pipelines in California. Assuming that all or substantially all of the throughput charges proposed in this proceeding will be passed through to the shippers of petroleum products, it is estimated that the pipeline transportation costs of the Department of Defense will increase, as a result of the proposed regulations, by over $100,000 annually.

The Secretary of the Army has been designated as the single manager for all DOD transportation requirements,

including shipment of petroleum products. The Secretary exercises this function through the Military Traffic Management Command, a Department of Army Command responsible for insuring that DOD transportation resources are so organized and managed as to assure optimum responsiveness, efficiency and economy in support of the defense mission. In obtaining transportation services, DOD is required to select those means of transportation which will meet DOD requirements satisfactorily at the lowest over-all cost from origin to final destination. Department of Defense Directive 4500.9, 29 November 1971, 32 C.F.R. Accordingly, the Department of Defense is greatly concerned about any proposed regulations which might affect its ability to provide adequate petroleum transportation services to military installations in California and Nevada at the lowest over-all cost to the United States.

1. *The Revised Regulations Have Been Offered Under Circumstances and Time Constraints Which Unreasonably Limit Meaningful Comment by Interested Parties.*

DOD recognizes that the question of whether rental charges for pipeline rights of way should be based on throughput has been before the Commission for over a year. However, the announcement and scheduling of the most recent hearing on the Staff's revised proposal gives woefully inadequate time for consideration and presentation of views concerning this important matter. While the staff has had nearly a year to formulate their revisions to the original proposal, interested parties such as the Department of Defense have had less than 10 days notice of these revisions to prepare a response. As indicated above, the proposed charges are likely to have a substantial impact on DOD and certainly an equal, if not greater, impact on other major shippers of petroleum products, as well as upon the pipelines themselves. Under such circumstances it is imperative that those most directly affected be given full and complete opportunity to respond to these pro-

posals. DOD, for example, has had considerable experience in leasing techniques for Federal lands which might be helpful to the Commission, but such information cannot be developed within the abbreviated time frame given. Additionally, full assessment of the actual impact of the revised proposals on DOD transportation requirements and routing arrangements cannot be determined without a reasonable time to study these new proposals. DOD strongly urges that no action be taken on the revisions without affording interested parties additional time (at least 30 days) to review these proposals and an opportunity to present additional evidence based thereon.

2. *The Regulations Proposed, If Adopted, Unfairly Impose Increased Charges on Existing Pipeline Facilities Which Have No Practical Alternative To The Crossing of State Lands.*

The revisions offered by the staff appear to make no distinction whatsoever between the charges to be assessed for existing rights-of-way as opposed to new rights-of-way granted by the Commission. As the Commission is undoubtedly aware, many of the pipelines which may be subjected to the new charges have been in place, providing transportation services across state lands for many years. These pipelines represent large fixed investments in plant which cannot be relocated without prohibitive and wasteful expenditures. Additionally, some pipeline facilities were constructed primarily to service military facilities and could not be relocated without substantial disruption of defense fuel requirements. Undoubtedly many, or all, of the pipeline routings were determined in reliance upon existing state rental practices and under the assumption that such practices would remain relatively stable. Accordingly, any radical departure in the level or calculation of charges for the lease of state lands places an unreasonable burden on both pipeline and shipper since they are, in a very real sense, captive lessees, having no reasonable alternative to

the charges that the State proposes. In the case of new rights-of-way, the prospective lessee has the opportunity to take or leave the proposal and to plan pipeline routing accordingly. Such options are unlikely to exist for pipeline facilities already in place over state lands. In DOD's view it is incumbent upon the Commission to give considerable weight to this substantial commitment of facilities and the reliance by the pipelines upon long-standing rental practices. If the Commission determines that volume based rates are otherwise lawful, recognition of the inherently inequitable nature of the proposed volume charges on in-place facilities could be accomplished by exemption of existing pipeline leases from the volume charges and a judicious application of the charges in other cases.

3. *The Regulations Proposed Leave Unanswered Many Questions Concerning The Basis For Assessment of Volume Charges.*

The proposed regulations appear to offer the Commission three alternatives for the assessment of rental for rights-of-way and Section 2006(c) provides several factors which the Commission shall consider when determining which method shall be selected. Section 2006(c)'s enumeration of factors, however, raises more questions than it answers. Factors (1) and (2), as they relate to volume charges, appear to imply that volume charges are in part based on considerations of potential environmental damage which might be caused by pipeline operations. If volume charges are meant to compensate the State for the risk of possible environmental damage then the Staff should indicate the extent to which this affects or absolves the pipeline and shipper of common law liability for damages to the leasehold. No indication is given as to the relative weights to be accorded these various factors and the list does not appear to allow, require, or accord consideration to the interests of either the carriers or shippers, particularly the historical reliance by the carrier on the use of

state lands under long-standing conditions. Further, there is no indication whether the Commission's choice of alternatives will be uniform for all state lands or may vary from lease to lease, a situation which would permit discrimination between and among different carriers.

4. *The Proposed Regulations Appear to Constitute an Unreasonable Burden on Interstate Commerce.* DOD concurs with the argument previously advanced by various other parties that, in the absence of evidence establishing a reasonable relationship between volumes of oil passing through a pipeline and the value of the land or services provided by the State, rental charges based on volume constitute an unlawful burden on interstate commerce. DOD has argued before the Interstate Commerce Commission and believes that it is that Commission's view that pipeline transportation of petroleum within a single state following interstate or foreign water carriage is in interstate commerce and subject only to I.C.C. jurisdiction. *United States Department of Defense v. Interstate Storage and Pipeline Corporation,* I.C.C. Docket No. 36217; *Monsanto Co. v. Alton Southern Ry. Co.,* 339 I.C.C. 319 (1971); *Osborne McMillan Elevator Co. v. M., St. P. & S.S.M.R. Co.,* 306 I.C.C. 155 (1959). Because the proposed volume charges are based on a commodity moving in interstate commerce, and in the absence of evidence establishing a link between the commodity volume and nature of the services provided by the lessor, such charges constitutes an unreasonable burden on interstate commerce.

Conclusion

It is obvious that the ultimate result of the volume charges proposed is to increase the costs of transporting petroleum in the State of California, costs which will be passed along to the users of such services. Unlike commercial businesses, the Department of Defense cannot pass increased costs on to customers who may choose or not choose to buy more expensive goods and services as they

see fit. With respect to petroleum volumes shipped by the U.S. Government, the increased charges proposed will be borne ultimately by the taxpayers, including the citizens of the State of California. The Commission should give careful consideration to this fact and to the other considerations raised herein.

Respectfully submitted,

/s/ Dellon E. Coker
Chief, Regulatory Law Office
Office of The Judge
Advocate General
Department of the Army
Washington, D. C. 20310
For
The Secretary of the Army

Cpt Paul M. Scott
Attorney
Of Counsel

[Certificate of service omitted in printing]

STATEMENT BY PACIFIC GAS & ELECTRIC COMPANY

DATED APRIL 21, 1976

Statement of
Pacific Gas and Electric Company
by
J. Peter Baumgartner, Attorney
before the
Division of State Lands
April 21, 1976

INTRODUCTION

Pacific Gas and Electric Company (PGandE) opposes certain features present in the State Lands Commission (SLC) proposal to repeal Title 2, California Administrative Code, Article 2, and substitute new Articles 2 and 2.5 therefore. PGandE's interest in the matter is based on its ownership of several marine petroleum terminal sites and many river and other wetland natural gas pipeline crossing sites presently under lease from SLC. The amendments objected to would, if enacted, allow the State Lands Commission to impose a "throughput" charge on an "ad hoc" basis for any commodity, including crude oil, petroleum products, natural gas and liquified natural gas, and related products passing through pipelines that are located on State lands.

This is not a new proposal. In 1974, the Auditor General proposed similar "throughput" charges to be applied to SLC administered leases for marine terminal sites. No rationale supporting this concept has ever been advanced by the SLC.

In 1975, the Commission ordered an investigation by the Division of State Lands into the concept of rental rates based on "throughput." That proposal would have man-

dated the imposition of a "throughput" charge based on a prescribed rate times the unit of oil or gas whenever that charge would yield a greater return to the State than the standard rental. PGandE opposed the concept for various reasons, including an estimated additional financial impact on the Company's electric and gas customers in the order of $4 to $5 million annually in an era of rapidly escalating energy costs, the lack of any relationship of the charge to the value of the lease to the lessee, and that it was, in fact, a "tax" on the products carried in interstate commerce already pervasively regulated by the Federal Government. No rationale was advanced by either the State Lands Commission or the Division of State Lands to support the "throughput" charge.

Comparability with Port Facilities

The use of marine terminal facilities, which are controlled by various port authorities in the State, is not a proper comparison to the offshore marine sites being leased by the SLC. A port authority generally undertakes various engineering, construction, and maintenance responsibilities, and provides security for the facility which, in return for the "throughput" charge, provides the lessee with wharfage, dockage, and usually land for necessary facilities. The annual rental charge by the port authority is generally an amortization of the cost of such facilities over the term of the lease agreement. The lessee receives the use of the improvements and the "throughput" payments are used by the lessor to defray the cost of services which he provides. In the case of the marine terminal leases, which PGandE holds from the SLC, the SLC does not lease marine terminal facilities, but rather it leases unimproved marine terminal sites in which the State has made no investment and on which the State intends to expend no funds. All improvements are provided by the lessee. Even aides to navigation are provided by the lessee and are

maintained at the lessee's expense. Equating the ... lease fee, based on throughput of oil through improved facilities with the "throughput" charges proposed in the amendments for SLC unimproved tidelands, is unreasonable.

The same rationale underlies PGandE's opposition to the application of "throughput" charges to natural gas moving through pipelines buried under the State's inland navigable waterways. The "throughput" charge may be likened to the tolls collected by the California Toll Bridge Authority. An auto driver crossing the series of toll bridges will pay a toll each time he crosses a bridge. If the proposed amendments are enacted, the SLC may collect a tax on each unit of gas or oil each time that unit proceeds through the pipeline buried in an SLC lease. But, there the similarity ends. The Toll Bridge Authority, in return for the payment of the toll, provides and maintains an expensive bridge structure. The tolls are used not only to maintain the bridge, but also to amortize the capital investment. In the case of natural gas pipelines, the State provides only an unimproved underwater lease site. The lessee is required to provide the total capital investment, maintain the pipeline, mitigate any environmental consequences, and bear the burden of risks of danger to persons and property resulting from lessee's operations.

It should be noted that SLC leases for natural gas pipelines and fuel oil pipelines in unimproved terminal facility leases are essentially nonexclusive leases. The lessee's facilities interfere in no way with the multiple use of the water by others. With the exception of the small periods of time when marine terminal berths are actually occupied by tankers, others are free to use the waterway for recreational and commercial purposes. Natural gas pipelines, likewise, are no barrier to the commercial or recreational use of the waterway or the river bottom. It is PGandE's position that the extraction of a "throughput"

charge, as an alternative to annual lease payments based on the appraised value of the land, is the extraction of a fee for no services rendered.

Impact on the Consumer

The imposition of "throughput" charges would have a direct impact on PGandE's electric and gas rate schedules for the average citizen in PGandE's service area, which includes most of Northern and Central California. Assuming the "throughput" rates imposed are comparable to those contained in the 1975 proposal, the increase in costs to be expected can be exemplified as follows:

PGandE's present lease payments at Morro Bay for 58 acres of land and about 3,000 feet of buried pipe are $28,420.08. Applying the "throughput" charge from the 1975 proposal to the estimated fuel oil requirements for 1977 at Morro Bay will cause the payments to escalate to an excess of $75,000.

"Throughput" charges seem particularly inappropriate for our electric utility fuel because, except for small quantities of low sulfur crude, almost all of our low sulfur fuel is residual oil from California refineries. Assuming the imposition of a "throughput" charge on the refiners, our electric customers will pay the charge as many as three times; once when the oil company brings crude in, once when the residual commodity is shipped out, and once when it is delivered to PGandE through Company facilities.

PGandE serves a population of 8.6 million people of which 7 million customers are gas customers. In order to serve these customers, PGandE has 4,815 miles of natural gas transmission pipelines and 26,000 miles of distribution pipelines. Through these pipelines, we deliver 672 billion cubic feet of natural gas annually. Some additional quantities of natural gas are delivered to the fossil fuel steam electric generating plants for the generation of electricity.

Lease payments on two of PGandE's Canadian gas line crossings of the San Joaquin and Sacramento Rivers would rise from $6,920 to $856,640 if the 1975 proposed rates were imposed. The increases for these two exemplary leases result in payments 123 times as great under the "throughput" charge proposal as under the usual method of calculating lease payments.

"Throughput" charges would, in effect, place an indirect tax upon the utility customers within our service area since such a charge would become part of the operating expense in deriving electric and natural gas rates. The additional costs of metering facilities necessary to accurately determine gas flow through the lease would be added to the rate base. Such indirect taxations seem unjust in light of the large increases in electric and gas rates that have already occurred due to rising costs of energy producing fuels. It is also possible that such a "throughput" charge would approximate a tax on Interstate Commerce, particularly with respect to the Colorado River natural gas pipeline crossing and the marine fuel oil terminals.

PGandE's studies, in response to last year's proposal, show that the Company would be passing through to its customers an additional cost attributable to the "throughput" charges of $4 million annually. Because there is no rate set in this year's proposal, the potential impact is much larger. The cost of new supplies of gas delivered in California will be very much higher in the future. PGandE is concerned about the ever increasing burden that consumers are being asked to bear. The additional burden cannot be avoided when it is rationally related to the increased costs of essential services and raw materials. It is PGandE's position that when increased costs are not rationally related to essential services and raw material costs, it is indefensible to place this burden on consumers of essential energy, many of whom are elderly and poor

and who are less able than others to subsist without a plentiful supply of electricity and gas.

As a regulated utility charged by law with providing an adequate and reliable supply of essential energy in two forms to almost all of Northern California, the Company's planning and operations are continuously monitored by State and Federal agencies. From the design and location of power plants to the selection and routing of fuel alternatives, from the price at which we obtain fuel to the price at which we sell energy, our decisions are scrutinized by the Energy Commission, the Public Utilities Commission, the Federal Power Commission, the FEA, the NRC, and a host of other agencies. The imposition of "throughput" charges on utilities will have a grievous, if presently an unquantifiable input on the Company's operations, rates, and planning, all of which are regulated. For example, if larger "throughput" charges are imposed on one type of fuel, another becomes much more economical not only in our own plants, but in the plants, businesses, and homes of our customers. The available choices are being investigated and guided now by the "alphabet" agencies based on a careful evaluation of all the facts and their ramifications; it should not be State policy to convert every lease application into a system wide rate, operation, and planning decision whose impact may distort the announced policies of the State and Federal agencies who are attempting to construct a rational energy policy for the State. The purvase regulation of utilities furnishes a sound legal basis for exempting the facilities of publically regulated utilities from "throughput" charges. At the least, the SLC should refer the proposed regulations to the appropriate regulatory agencies for investigation, analysis, and comment.

Not once during the last three years has the Commission or the Division of State Lands set down in plain English a

rationale for imposing "throughput." Not one scrap of evidence, factual or conclusionary, has been introduced which would support the changes in the rental regulations as proposed. PGandE urges the State Lands Commission to reject the "throughput" charge technique as a basis for computing rental charges on SLC administered leases, particularly for utilities. The proposed alternative method of computation of an annual rental, based on the appraised value of the land plus a fixed fee based on the diameter and length of the pipeline buried in leased lands, will produce revenues sufficient to yield a reasonable rate of return for the use of the State's submerged lands.

STATEMENT OF WESTERN OIL & GAS ASSOCIATION DATED APRIL 21, 1976

Statement on Behalf of the
Western Oil & Gas Association
Before the
California State Lands Commission
Sacramento, California
April 21, 1976

Re: Proposed Changes in the Commission's Leasing Regulations to Permit Imposition of Throughput Charges

My name is Greg McClintock. I am appearing here today as attorney for the Western Oil & Gas Association, which, as you may be aware, is a trade association whose members conduct more than 90% of the production, refining, transportation and marketing of petroleum and petroleum products in the Western United States, including the State of California. I respectfully urge the Commission to reject the proposed changes in your regulations which would allow the imposition of a throughput charge. However well intentional these proposed changes may be, we believe the Commission is being asked to do something that is clearly unlawful and beyond its authority. We come to that conclusion for the following reasons:

First: What is being proposed is an entirely new system of establishing rentals for the use of unimproved State lands—a charge for the use of such lands based *not* on what the State has given up or even on the costs to the State of administering its leasing program, but rather a charge based on the amount of product being transported across the land.

As I am sure the Commission is aware, valuation of easements and rights-of-way across both State and private property have traditionally been based on the concept of restoring the owner of the property to the same economic position he would have been in but for the granting of the

easement or right-of-way. This traditional method of valuing easements and rights-of-way—a method designed to prevent a windfall to the owner of the property by reason of his strategic location in the pathway of some necessary facility—has been codified into law in California. Section 6503 of the Public Resources Code instructs the Commission to "appraise the land" and establish its rentals based on that appraisal. The existing regulations, for the most part, are in harmony with the statutory directive and traditional easement and right-of-way valuation concepts. A charge based on what is passing over the land, however, would have no nexus with the value of what the State has given up or with the land's appraised value.

Second: Many of the easements and rights-of-way which could be affected by the proposed throughput charge are used to transport commodities that have arrived in the State or are making their departure by vessels or pipelines which cross State boundaries or enter Federal waters. Charges based on the volume of commodities being so transported have historically been overturned by the Courts as impermissible restraints on the free movement of interstate commerce, and such charges have invariably been found violative of the Federal Constitution where, as here, none of the factors which the Commission would be permitted by its proposed regulations to consider in imposing the charge can be related to the volume of the shipments being made. The factors which could be considered by the Commission all relate to either the value of the improvement made by the lessee, which cannot be taken into consideration at all in appraising the value of the land, or to the size of the facility which would be constructed on the State's land, thus affecting the value of what the State is giving up. There being no permissible basis on which the Commission could justify the imposition of a throughput charge, it would fall within that class of charges which are forbidden because they inhibit free commerce.

Third: To the extent that marine transport is associated with a State lease, a throughput charge would be further violative of the Federal Constitution because such a charge would be what is technically known as a duty on "tonnage." Many of the easements and rights-of-way which have been leased by the Commission service marine terminals.

Fourth: The imposition of a throughput charge by the State, even a relatively modest one, will undoubtedly have the effect of inducing a wide range of other governmental agencies and possibly private landowners to impose similar charges. And to the extent that several crossings of State land would be required for particular pipelines or products are changed into a different commodity before making the same crossing a multiplier effect could come into play which would greatly escalate transportation costs. The proposal therefore has substantial potential for exerting pressure to substitute rail, truck and tanker transportation for pipelines. It need hardly be emphasized that major environmental impacts would result from such a shift.

Even in the absence of such a shift, the substantial increase in total revenues to the State which would result from all such leases might ultimately impact on consumer prices, creating economic pressures which would, in turn, have their own environmental effects. There being no exemption from CEQA for this type of State action, it appears obvious to us that the preparation of an environmental impact report dealing with these potential consequences is required. So far as we are aware, no such report has been prepared.

Beyond these legal problems, and from a purely practical point of view, the adoption of such a proposal at this particular time, when the consumer and the business community are already struggling under the very heavy

burden of inflated costs in all sectors of the economy would seem particularly unwise. The potential ripple effect (imposition of similar charges by other public and private landowners) could make many activities—not only petroleum transport, but the transportation of electricity, water and telephone signals—economically prohibitive. We do not believe the State Lands Commission really intends such consequences or would accept them solely to increase revenues to the State.

For both the various legal reasons outlined above and the unwelcome practical consequences which could flow from adoption, we most strongly urge the Commission to reject this proposal and retain its current regulations, regulations which we believe provide the State with a more than fair return for the property rights being given up.

Thank you very much.

LETTER FROM SAN DIEGO GAS & ELECTRIC COMPANY DATED APRIL 20, 1976

April 20, 1976

State of California
State Lands Division
1807 13th Street
Sacramento, CA 95814

Attention: Mr. James F. Trout
Manager, Land Operations

Gentlemen:

San Diego Gas & Electric Company has reviewed the latest regulations proposed by the Commission as expressed in your letter dated April 8, 1976, and would like to offer the following comments.

In the interest of avoiding repetition and duplicating our past efforts, we ask the Commission to refer to our letter dated April 25, 1975 (copy enclosed) which summarized and graphically illustrated our areas of concern and disagreement regarding the methodology of such Commission regulations.

The most noticeable revision to the latest regulations is the absence of a rate schedule employing the volume of commodity concept. Not knowing how the Commission will apply this concept, we must take exception simply on the basis of it being too vague and ambiguous.

We and other utilities have conceptually agreed that the Commission is entitled to a reasonable rate of return for the use of State lands while employing and adhering to universal land appraisal practices. To additionally burden

the utility industry with regulations employing the volume of commodity concept appears to disregard the adverse ramifications that are surely to follow. The interest of the customers we serve demands consideration because they will ultimately be the recipients of these rate increases proposed by the Commission.

Sincerely,

/s/ R. L. Ellis, Manager
Engineering Land Department

SAN DIEGO GAS & ELECTRIC COMPANY

April 25, 1975

State of California
State Land Commission
1807 - 13th Street
Sacramento, CA 95814

Attention: James F. Trout
Manager, Land Operations

Gentlemen:

Your April 7, 1975 letter presented proposed revision of regulations for non-extractive lease operations on State owned lands under the jurisdiction of the State Lands Commission.

San Diego Gas & Electric Company vigorously objects to the proposed "throughput" charge for crude oil, petroleum products, natural gas and liquefied natural gas passing through pipelines located on State owned land because of the unfair burden it will impose upon our electric service customers.

The proposed "throughput" charge would have major impact upon our Encina Offshore Mooring Facility and connecting pipeline at our Encina Power Plant in Carlsbad, California. This is the only mooring facility in our region capable of handling the 70,000 dead weight ton (dwt) tankers (431,000 barrels (bbl) capacity) which deliver most of the low sulfur fuel oil we are required to use by Air Pollution Control District regulations. Thus, essentially all of the fuel oil used in our fossil fueled electric generating plants must be delivered to Encina with a portion later trans-shipped by barge to San Diego Bay for use in our South Bay, Silvergate and Station "B" power plants. This

double handling trans-shipment operation is forced upon us by the inadequate depth of San Diego Bay which can only accommodate fully laden T-2 class 17,000 dwt tankers carrying 105,000 bbl or partially laden 35,000 dwt tankers carrying no more than 160,000 bbl.

San Diego Gas & Electric Company must use fuel oil in increasing quantities for electric generation because of the growing unavailability of natural gas for this purpose. The following tabulation illustrates the increased dependency on fuel oil:

Year	Natural Gas	Fuel Oil	Other (1/)
1971	53%	28%	19%
1975 est.	28	57	15
1980 est.	0	94	6

(1/) Purchased energy and nuclear.

According to Schedule A of the proposed regulations, the "throughput" charge for our 3525 foot Encina pipeline would be at a rate of 1.6¢ per barrel. Based on the estimated quantities of fuel oil to be delivered to Encina in the 1975-1980 period, the "throughput" charge would be as follows:

Year	Million Barrels	"Throughput" Charge In Dollars (Rounded) @ 1.6¢/bbl
1975	9.096	$145,000
1976	11.999	192,000
1977	14.662	234,000
1978	15.828	253,000
1979	16.920	270,000
1980	17.697	283,000

This added cost of fuel for generating electricity must be borne by our customers who have already been burdened with major increases in the cost of oil fuel. It certainly seems inappropriate for one arm of State government—

the Public Utilities Commission—to order us to do everything possible to keep the cost of fuel down while another State agency is proposing to raise the cost of fuel. The "throughput" charge for natural gas which would immediately apply to our gas lines crossing San Diego Bay to provide gas service to the community of Coronado, is similarly inflationary.

San Diego Gas & Electric Company submits that a "throughput" charge is not an appropriate means for determining pipeline rights-of-way rental. It is a complete change in the present universal practice of relating rights-of-way rental upon unimproved land to the value of the land. To our knowledge use of "throughput" charges have historically been applied by public agencies which are amortizing investment in plant or facilities such as wharfs and docks, tanks or pipelines.

We do not object to the recommended increase from 6% to 8% for annual rent based upon the value of the land which appears reasonable and consistent with standard practice. This form of rent could also be charged for a reasonable strip of land covering pipelines or converted into an equivalent alternative such as the present charge of 1.5¢/diameter inch/lineal foot of pipeline/year.

On behalf of our customers, San Diego Gas & Electric Company vigorously objects to the proposed "throughput" charge. Our customers have already been burdened with significantly increased utility rates and face further increases because of economic and inflationary factors over which neither our Company nor the State have control. The imposition of State mandated increases appears to be totally inappropriate.

If for reasons not apparent in your letter of April 7, 1975 the general public interest requires imposition of a surcharge such as the proposed "throughput" charge, the

regulations should clearly exempt all forms of fuel transported across lands under the jurisdiction of the State Lands Commission for use by utilities in electric generation and natural gas for ultimate distribution to a utility's customers or provide a rebate to off-set the surcharge.

Sincerely,

/s/ C. M. Laffoon

cc: Kenneth Cory, Chairman
State Lands Commission

William Northrop, Executive Officer
State Lands Commission

LETTER FROM SOUTHERN CALIFORNIA EDISON COMPANY RECEIVED APRIL 21, 1976

State of California
State Lands Commission
1807 - 13th Street
Sacramento, CA 95814

Attention: Mr. James F. Trout
Manager, Land Operations

Gentlemen:

On behalf of Southern California Edison Company, I would like to offer the following comments regarding proposed changes to the Commission's rental regulations, Article 2 of the California Administrative Code. These comments supplement our comments to you set forth in my letter of May 2, 1975.

As we stated in our letter of May 2, 1975, Southern California Edison Company is strongly opposed to the proposed throughput charge on oil moved by pipeline across State-owned lands because it is unreasonable and unfair. *Such charges will only place additional cost burdens upon electric ratepayers of Southern California* who have in recent years been burdened with rapidly escalating electric rates due to the effects of general inflation, skyrocketing fuel costs and the required use by utilities of higher proportions and quantities of high quality, high cost, low sulfur fuel oil.

Proposed Sections 2006(b)(2) for *Industrial Leases* and 2006(b)(7) for *Rights of Way* provide as an alternative rental a throughput charge based on volume. This alternative rental fails to specify the rate at which such a charge is to be applied. Because of our increased dependence on fuel oil, as evidenced by decreased availability of natural

gas, and uncertainties regarding future generating sources, we believe the consequences of such throughput charges will be to contribute to increased costs of electric service to our customers. It is our opinion that ratepayers should not be penalized for expected increases in volumes of oil which pass over State lands.

Proposed Section 2006(c) sets forth the various factors which are to be considered by the Commission in determining which of the alternative rentals is in the best interests of the State. The Section significantly fails to include among such factors the economic costs of each alternative rental to utility customers.

Proposed Section 2007(b)(2) is apparently intended to limit rental rates for right of way based on volume by apportioning in the proportion that the length of a pipeline passing over State lands bears to the total length of the pipeline. It is unclear what the limiting factor is and further what charges would be computed based upon this formula.

It is our concern that the overall consequence of these regulations will be to add another unnecessary increment to oil costs which must be passed on to our customers.

We once gain suggest that if the proposed regulations are adopted, that they be revised to specifically exempt from the throughput charge fuel moved by pipeline across State lands for ultimate use by utilities who have a public service responsibility to provide service to their ratepayers at lowest reasonable costs.

Very truly yours,

/s/ P. B. Peecook

EXCERPT FROM TRANSCRIPT OF STATE LANDS COMMISSION MEETING OF APRIL 28, 1976

* * *

[A.R., p. 654*]

EXECUTIVE OFFICER NORTHROP: Mr. Chairman, this is a project that the staff has been working on for over a year. We are now ready to propose to the Commission the adoption of some regulations on volumetric rental rates. You have **[A.R., p. 655]** in front of you, I believe, a report which was circulated among all of you prior to this meeting.

I think, at this time, Mr. Taylor's office and Mr. Trout's office have done a great deal of work on this. I would like, at this time, to turn the area of the presentation for the staff to Mr. Taylor, Mr. Trout, and Mr. Hight.

Mr. Taylor, would you care to lead?

MR. TROUT: Maybe I will take the lead, then.

The Commission will probably recall that early in your tenure here as Commissioners, last March, you proposed volumetric rental rates and a general number of changes in the regulations to bring rental rates currently to the market place.

Following the Commission action in March, hearings were held April 29 in Sacramento, and May 2nd in Long Beach, on the new rental regulations. Those hearings produced only comments concerning the volumetric rental rates, and one gentleman appearing concerning salaries. All but the volumetric rate schedule were adopted by the Commission in May, 1975.

At that time, the Commission directed the staff and the Office of the Attorney General to conduct additional review and hold additional hearings and make additional deter-

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*Page references are to pages of the State Lands Commission's Administrative Record which contain the reporter's transcript of proceedings for April 28, 1976.

minations as necessary. Meetings were held with the public utilities as a group on July 22nd, 1975; with the [A.R., p. 656] common carriers on July 23rd, 1975; and with representatives of the oil industry on July 31st, 1975.

In reviewing this, the Office of the Attorney General retained an evaluation consultant familiar with special use property appraisals. The Division staff and the consultant continued to investigate leasing processes of major California ports, examined numerous right-of-way leases issued by public and private entities, and, in general, conducted a search of data relating to the leasing of similar lands.

The points brought out by those appearing at the hearings were basically these: That the initially proposed schedule would result in a rental being charged several times for the same product. That there was a potential pecuniary defect if the State adopted the rental based on volumetric charge. That other landowners might well charge on the same volumetric basis, with the result being a prohibitively high transportation cost, even if there were no precedence for the imposition of a volumetric charge. And four, that the proposed fixed rental schedule would result in an arbitrary, discriminatory, and unjustifiable rental being imposed by the Commission.

On review, we find that these situations are not a result of volumetric rental rate charges. We find that the private landowners frequently charge for logging based on the [A.R., p. 657] amount of board feet transported over the road. Here the responsibility for road construction and maintenance is generally the responsibility of the timber harvester.

There is evidence of a first-time throughput charge for rights-of-way used for hauling coal. The City of Seal Beach, in return for a franchise to use city-owned streets, charges Exxon two percent of the royalty paid the State on offshore oil and gas. The private property leased by the Hollister Estate Company, in return for the use of pipe line rights-of-way, charges two percent of the royalty paid to the State.

A portion of the wharfage charge imposed by ports for the off-loading of cargo on port lands represents a throughput charge for use of unimproved lands. Similarly, it appears that a portion of throughput charge imposed by pipe line operators for the use of their pipe lines necessarily goes to recover and obtain the return of right-of-way costs.

Percentage leases form a variable rental lease also where the amount of rental is influenced by volume. In this case, the volume was goods sold. It might be bourbon highballs, or something, but the same kind of thing.

The revised proposal before you today is based on the following staff determinations: That land rentals, varying with the volume of commodities passing over [A.R., p. 658] unimproved lands, is being enjoyed by other landowners in similar situations.

Two, that volumetric rental is otherwise reasonable and under all circumstances may be employed as one of the alternative rental basis used by the Commission. Instead of adopting an inflexible schedule of volumetric rental rates, uniformly applicable to widely varying factual situations; it is preferable to refer to the volumetric rental concept based on several alternatives and several options available for use by the Commission, at the same time, providing it with some criteria for establishing and applying its rental concept.

Now, several additional proposals, or objections, have been raised including the fact that the Code requires appraisals, that an environmental impact report is required, that the rental rate is, in fact, a charge and would be an unreasonable burden on interstate commerce. We find that none of these proposals have any merit. In the staff's judgment, the proposed regulations as revised have a sound basis in fact and in law. Your staff recommends that they be adopted by the Commission.

* * *

REPORT OF THE STATE LANDS DIVISION ON VOLUMETRIC RENTAL RATES PRESENTED AT STATE LANDS COMMISSION MEETING APRIL 28, 1976

[This report is printed as Exhibit 1 to the affidavit of Gary H. Horn, set forth earlier in this Joint Appendix, and is not reprinted here.]

PORT OF LONG BEACH TARIFF NO. 3
[EFFECTIVE JANUARY 15, 1975]

* * *

SECTION 1—DEFINITIONS—Continued

WHARF—WHARF PREMISES

Item No.

(a) "Wharf" shall mean and include any wharf, pier, quay, landing or other stationary structure to which a vessel may make fast or which may be utilized in the transit or handling of goods and merchandise, and shall also include all the area between the pierhead and bulkhead line, excepting, however, such locations as may be set apart as public landings or for private use. 108

(b) "Wharf premises" shall mean and include, in addition to the area included in the term "wharf," other port terminal facility areas alongside of which vessels may lie or which are suitable for and are used in the loading, unloading, assembling, distribution or handling of merchandise.

* * *

MERCHANDISE

The term "merchandise" includes all goods, wares, material, freight, cargo, live animals, water, fuel, lubricating oils, vessel's stores and supplies, and other merchandise. 111

* * *

SECTION 2—PILOTAGE

DEFINITIONS

(a) PILOTAGE: The charge, calculated in accordance with the pilotage charges named in this tariff, assessed against a vessel, which is subject to the payment of pilotage under these rules, for the service rendered or proffered of piloting such vessel on entering, leaving or shifting in the Port of Long Beach. 200

* * *

SECTION 3—DOCKAGE

DEFINITION OF DOCKAGE

Item No.

DOCKAGE: The charge, calculated in accordance with the dockage charges named in this tariff, assessed against a vessel for berthing at or making fast to a municipal wharf, pier, bulkhead structure, or bank (inside berth), or for mooring to another vessel so berthed (outside berth). 300

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SECTION 4—WHARFAGE

WHARFAGE, DEFINITION OF:

Wharfage: The charge assessed against all merchandise (See Item 111), calculated in accordance with the wharfage charges named in this tariff for the passage of that merchandise onto, over, through or under wharves or wharf premises (see Item 108) or between vessels or overside vessels (to or from barge, lighter, or water) when berthed at wharves or wharf premises or when moored in a slip adjacent to a wharf or wharf premise. Wharfage is solely the charge for use of wharves or wharf premises and does not include charges for any other service or 400

WHARFAGE, APPLICATION OF:

(a) Except as otherwise provided in this tariff, the wharfage charges named are in cents per ton of 2,000 pounds or 40 cubic feet, according to vessel's manifest, on whichever basis the water freight charges are assessed. 405

• • •

WHARFAGE, CHARGES FOR:

Wharfage charges, as provided in this section, are in addition to all other charges contained in this tariff and shall, unless otherwise provided, be assessed against all merchandise, except that afforded free wharfage under the provision of Item 410 and shall be paid in accordance with Item 1225. 417

ARTICLES	Rates in Cents	Item No.
Merchandise, [not otherwise specified] (See Exception 1)	◆200	◆420
Exception 1: Free wharfage is provided for certain merchandise in Item 410.		
Merchandise, in bulk (See Exceptions 1, 2, 3, and 4)	◆ 70	
Exception 1: Gypsum Rock, in bulk, from self-unloading vessel at Berth 83	◆ 33	
Exception 2: Merchandise, in bulk, to vessel at Piers D and G by means of belt conveyor type mechanical ship-loaders or by gravity chutes, except: beans; feed, animal and poultry; grain and grain products; oil seeds; peas; pellets, alfalfa, beet pulp, copra, and cottonseed; safflower seeds; seeds, soybeans; and related products, processed or unprocessed, in bulk	◆ 33	◆425
Exception 3: Grain originating in O.C.P. Territory as defined in Item 117, per bushel	◆ 0[illegible]	
Exception 4: Salt, in bulk	◆ [illegible]	
Merchandise, in bulk, in cargo vans	◆200	◆430
Bananas, per ton of 2,000 pounds	◆200	
Exception: Direct from vessel by private mechanical conveyors, per ton of 2,000 pounds	◆175	◆435
Boats, including launches, skiffs and yachts (including trailers and/or cradles) per 40 cubic feet (Subject to Notes 1, 2 and 3)	◆200	
Note 1: The maximum charge for a boat shall be $3.20 per lineal foot.		◆440
Note 2: When shipped in cradles or on trailers, the length of the cradle or trailer shall be included in the overall measurement.		

ARTICLES	Rates in Cents	Item No.
Note 3: Applies only in the Hawaiian Trade.		
Buildings, Modules, including mobile, per section	◆6500	◆443
Coffee, green, in bags, per ton of 2,000 pounds	◆200	◆445
Cargo Vans, (See Item 122), empty, having 70 cu. ft. or more space set-up, when no freight charges on the van itself are assessed, per ton of 2,000 pounds . . .	◆200	◆450
On all other cargo vans, except those on which no wharfage shall be assessed under Item 410(i), Merchandise [not otherwise specified], rates shall apply.		
Containers and Carriers, (used) shipping, empty [not otherwise specified], set-up or K.D. (not including bags and sacks), per 40 cu. ft. or 2,000 pounds, whichever yields the greater revenue	◆105	◆455
• • •		
Fresh Fruit and Fresh Vegetables, manifested on a per package basis, per ton of 2,000 pounds	◆200	◆460
Liquids, except petroleum and petroleum products and water, as provided in Section Seven, in bulk, from and to vessel through private line	◆ 40	◆465
Lumber and Lumber Products, viz.:		
Lumber, logs and timber, per 1,000 ft. [board measure]. (See Note 1)	◆360	
Cedar, Fir, Pine, Redwood, Spruce and all other softwood lumber, logs and timber, [not otherwise specified], including Laths, Shingles, Shakes and Ties, coastwise, inbound, per 1000 ft. [board measure]. (See Note 1)	◆133	◆470
Dunnage and Ship Lining (other than as provided in Item 410) per 1000 ft. [board measure]	◆300	
Piles and Poles, per lineal foot	◆ 4	

ARTICLES	Rates in Cents	Item No.
Note 1: If freighted by vessel on other than a B.M. basis, the Merchandise, [not otherwise specified], rate shall apply.		
Paper, viz.:		
Newsprint and wood pulp, per ton of 2,000 pounds	♦175	♦475
Passengers, each (See Exceptions 1, 2 and 3)	150	
Exception 1: Charges do not apply to passengers on vessels where accommodations are limited to 12 or less		
Exception 2: Charges do not apply to passengers traveling to or from points within a radius of 100 miles of the Port.		480
Exception 3: Charges do not apply to passengers traveling on vessels when exclusively engaged in accredited college or university educational programs.		
Petroleum and Petroleum Products:		
In bulk from or to vessel, direct through private line, per barrel of 42 gallons (See Exception)	♦ 01.33	
Petroleum products, except gasoline, in bulk, moving direct between vessel and tank car or truck	♦ 40	♦482
Exception: From barge to vessel at municipal wharf, when barge not previously loaded at municipal wharf, or at any other oil loading wharf designated by the General Manager, per barrel of 42 gallons	♦ 02.66	
United States Mail, per ton of 2,000 pounds	♦320	♦484

* * *

	Rates in Cents	Item No.
Vehicles, Motor, self-propelling, viz.: (See Exception) Automobiles, Pleasure, Passenger, Commercial or Freight, including chassis, freight trailers or freight semi-trailers, not boxed or crated, S.U. on own wheels, per ton of 2,000 pounds. (When boxed or crated, the Merchandise, N.O.S., rate shall apply.)	♦678	♦486
Exception: Does not include agricultural, earth-moving or road making equipment.		
Vessel's Stores and Supplies, per ton of 2,000 pounds (other than as provided in Item 410)	♦200	♦490

• • •

SECTION 5—WHARF DEMURRAGE, WHARF STORAGE AND FREE TIME DEFINITIONS

(a) Wharf Demurrage is the charge, calculated in accordance with the Wharf Demurrage rates as provided herein, assessed against merchandise which remains on the wharf or wharf premises after the free time allowed.

(b) Wharf Storage is the charge, calculated in accordance with Wharf Storage rates as provided herein, assessed against merchandise which remains on the wharf or wharf premises and has been accepted for storage. 500

• • •

(e) Free Time is the specified number of days during which merchandise may occupy space assigned to it without being assessed Wharf Demurrage.

• • •

(9)

No. 84-16

In the Supreme Court
OF THE
United States

KENNETH CORY, LEO T. MCCARTHY, and
JESSE R. HUFF, members of the
California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX (Vol. III)

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney
General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

PHILIP K. VERLEGER
(Counsel of Record)
BETTY-JANE KIRWAN
JOHN P. ZAIMES
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 624-2400
Counsel for Appellees

Appeal docketed July 5, 1984
Probable jurisdiction noted October 1, 1984

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Volume III

Excerpts from the administrative record compiled before the California State Lands Commission in connection with the adoption of the challenged regulations, lodged with the district court on January 5, 1981.

LEASE BETWEEN CITY OF LONG BEACH AND EXXON CORPORATION

LEASE AND LICENSE AGREEMENT

This Agreement is made and entered into, in duplicate, as of the 5th day of July, 1974, pursuant to Ordinance No. HD-1038, adopted by the Board of Harbor Commissioners of the City of Long Beach at its meeting of June 3, 1974, by and between the City of Long Beach, a municipal corporation, acting by and through its Board of Harbor Commissioners, hereinafter referred to as "City", and Exxon Corporation, a New Jersey corporation, with a place of business at 1800 Avenue of the Stars, Los Angeles, California 90067, hereinafter referred to as "Lessee".

WHEREAS, City and Powerine Oil Company, as Lessee, entered into a Lease and License Agreement as of January 1, 1963, pursuant to Ordinance No. HD-657 of the Board of Harbor Commissioners of the City of Long Beach, wherein Powerine Oil Company was granted a lease of certain property upon which it constructed a tank farm for the storage of fuel oil and petroleum products, and wherein it was granted an exclusive license and permit to lay, construct, use, operate, maintain, repair, and renew two (2) fuel oil-bunkering pipelines in certain areas for the purpose of bunkering ships with its fuel oil, together with certain optional rights; and

* * *

WHEREAS, Lessee and City entered into a new Lease and License Agreement as of July 6, 1972, to supplant the above-mentioned Lease and License Agreement, which incorporated rights, privileges and obligations of other agreements, terminated said Agreement and another agreement, and provided for leasing additional land and water areas, and related facilities from City, and for installation of additional storage and bunkering facilities as therein provided; and

WHEREAS, Lessee and City desire to enter into a new Lease and License Agreement to supplant the Lease and License Agreement entered into as of July 6, 1972 * * * ; and

WHEREAS, the construction, operation and maintenance of fuel oil-burning services by Lessee will further promote and aid commerce and navigation in the Port of Long Beach;

NOW, THEREFORE, in consideration of the foregoing, and of the covenants, conditions and agreements herein contained, City, for itself, its successors in interest and assigns, and Lessee, for itself, its successors in interest and assigns, do hereby respectively agree to keep and perform all of the covenants, conditions and agreements hereinafter provided to be kept and performed by City and Lessee, respectively, to wit:

1. *TERM.* The term of this Agreement shall commence as of the first day of the month following the date of execution hereof by the General Manager of the Long Beach Harbor Department, and shall terminate June 30, 2010.

This agreement may, at Lessee's option, be terminated as of the last day of June in 1990 or 2000. Such option to cancel shall be exercised by written notice given by Lessee to City on or before the first day of January in the year in which the Agreement is to be terminated.

2. *PREMISES.*

a. *Leased Premises.* Effective as of the commencement of the term of this Agreement, except as otherwise provided, City does hereby grant, and Lessee accepts:

(1) An exclusive lease of those certain premises on Pier A in the Harbor District of the City of Long Beach, containing approximately 160,886 square feet, and designated Parcel 1 on Harbor Department Draw-

ing HD 4-31 attached hereto and by this reference incorporated herein.

(2) An exclusive lease of those certain premises at Berth 211-A, Pier A, in the Harbor District of the City of Long Beach, containing approximately 15,412 square feet, and designated Parcel 2 on said Harbor Department Drawing HD 4-31 attached hereto.

(3) An exclusive lease of that certain water area at Berth 211-A in the Harbor District of the City of Long Beach, containing approximately 15,211 square feet, and designated Parcel 3 on said Harbor Department Drawing HD 4-31 attached hereto. City reserves the right to itself and third parties to use said water area for navigational purposes to the extent the same is not used by Lessee pursuant to this Agreement.

Said Parcels 1, 2 and 3 are referred to herein as the "Leased Premises" or the "premises". The legal descriptions of said parcels are set forth in Exhibit "A", attached hereto and by this reference incorporated herein.

b. *Licensed Premises.* Effective as of the commencement of the term of this Agreement, City does hereby grant, and Lessee accepts:

(1) An exclusive license and permit to lay, construct, use, operate, maintain, repair, and renew fuel oil and diesel fuel underground bunkering pipelines, and related surface and subsurface appurtenances and facilities, for the purpose of bunkering vessels with Lessee's own (within the contemplation of Paragraph 3d(1)) fuel oil or diesel fuel on Piers A, B, C, D, F, G and J at the berths served by the pipelines depicted on Harbor Department Drawings HD 3-149-1, HD 3-149-2 and HD 149-3 attached hereto and by this reference incorporated herein.

* * *

d. *Assigned Premises.* Effective as of the commencement of the term of this Agreement, City does hereby grant, and Lessee accepts, a tertiary berth assignment for use of the wharf and wharf premises and the water area adjacent thereto required for the berthing of vessels, at Berths 209 and 210, Pier A. Lessee's right to use said wharf and berth facilities is subject to (1) the preferential berth assignment of Berth 210 granted by the Bulk Commodity Terminal Lease (Document No. HD-1332) entered into as of May 2, 1966, as amended, by and between the City of Long Beach, acting by and through its Board of Harbor Commissioners, and Koppel Bulk Terminal, (2) the secondary berth assignment of Berths 209 and 210 granted by the Lease and License Agreement (Document No. HD-2238) entered into as of June 30, 1972, by and between the City of Long Beach, acting by and through its Board of Harbor Commissioners, and National Molasses Company, and (3) to the rights granted by that certain lease entered into as of November 4, 1970, between the City of Long Beach, acting by and through its Board of Harbor Commissioners, and Ocean Salt Co., Inc. (Document No. HD-2068) with respect to the location of the overhead conveyor system at Berth 209.

e. *Exceptions, Reservations and Encumbrances.* There are excepted and reserved from the Leased Premises, from the Licensed Premises and Optional Licensed Premises and from the Assigned Premises all minerals and mineral rights of every kind and character now known to exist or hereafter discovered, including, without limiting the generality of the foregoing, oil, gas and water rights, together with the full, exclusive and perpetual rights to explore for, remove and dispose of said minerals, or any part thereof, from said premises without, however, the right of surface entry.

This Lease and License Agreement and all rights granted to Lessee hereunder are subject to restrictions, reservations, conditions and encumbrances of record, including,

without limitation, the following legislative grants, to wit: Chapter 676, Statutes of 1911; Chapter 102, Statutes of 1925; and Chapter 158, Statutes of 1935; Chapter 29, Statutes of 1956, First Extraordinary Session; Chapter 138, Statutes of 1964, First Extraordinary Session; the Charter of the City of Long Beach, the federal navigational servitude and, in addition thereto, any off-record matters affecting said Leased Premises of which Lessee has actual notice.

3. *USES.*

a. *The Leased Premises.* Parcel 1 and 2 may be used by Lessee for the construction, erection, installation, use, operation, maintenance, repair, and renewal of tank storage for Lessee's fuel oil, diesel fuel, other petroleum products and crude oil, and for related appurtenances and facilities, including, but not limited to, necessary electrical pumping facilities, warehouses, and office buildings, in conjunction with the operation by Lessee of its fuel and diesel oil-bunkering services under this Agreement. Parcel 3 may be used for the berthing and mooring of vessels, including barges, and for their loading and unloading, in conjunction with Lessee's operations.

b. *The Licensed Premises.* The Licensed Premises shall be used by Lessee to lay, construct, operate, maintain, repair, remove, extend, alter, and renew pipelines for the transportation of Lessee's own (within the contemplation of Paragraph 3d(1)) crude oil, fuel oil, diesel fuel and other petroleum products from the Leased Premises to vessels, including barges, at the berths of the Port of Long Beach and return lines for flushing purposes, together with all traps, manholes, and related surface and subsurface appurtenances and facilities thereto, for ingress to and egress from the same, along the pipeline routes shown on said Drawings HD 3-149-1, HD 3-149-2 and HD 3-149-3.

c. *The Assigned Premises.* The Assigned Premises may be used for the berthing of vessels, including barges, thereat and for the loading and unloading and other disposition of liquid bulk commodities between said vessels and barges at said premises and the wharf premises, for the embarking and disembarking of passengers and crew members and their baggage, and for the loading and unloading of vessels' stores and supplies. Whenever said Assigned Premises, or any part thereof, are not required, in whole or in part, by Lessee for the uses permitted under this tertiary assignment, the General Manager shall have the right to, and may make, temporary assignments to any other person, firm or corporation to use said Assigned Premises, or any part thereof, as provided in Port of Long Beach Tariff No. 3, as the same may exist or may be hereafter amended, or the successor to such tariff.

d. Lessee's operations conducted upon the Leased, Licensed and Assigned Premises shall be restricted to the following:

(1) A proprietary operation in which title to the crude oil and refined petroleum products, chemicals, liquids, and dry cargo referred to above shall be vested in Lessee at the time such commodities pass over the wharf from vessel or barge, or shall become vested in Lessee at some point in Lessee's pipeline or storage system on the Leased Premises, Licensed Premises or Assigned Premises, in accordance with the provisions of a purchase or exchange agreement. Lessee may load crude oil, fuel oil, diesel fuel and refined petroleum products, chemicals, liquids, and dry cargo referred to above aboard common carriers by water or any other vessel common carriers by water or any other vessels or barges at the wharf structure located on the Leased, Licensed or Assigned Premises for use or carriage by said vessels or barges, provided Lessee has title to said commodities up to the time the same pass ship's rail.

(2) An operation whereby Lessee may receive, handle, load, unload, and transport crude oil and refined petroleum products, chemicals, liquids, and dry cargo referred to above, owned by others, provided that the same shall not be loaded into or discharged from vessels that are common carriers by water, as said term is defined in the Shipping Act, 1916, as amended.

* * *

4. *CONSTRUCTION OF IMPROVEMENTS BY LESSEE.* Lessee agrees to install, or have installed, at its sole cost and expense, fencing and fire protection equipment, as may be required by the Long Beach Fire Department, on the Leased, Licensed and Assigned Premises.

In addition to the improvements described above, Lessee may, at its sole cost and expense, construct, erect and install additional buildings, structures and improvements and may make alterations thereto and to existing improvements, buildings and structures upon the Leased Premises, and may construct, erect and install improvements and may make alterations thereto and to existing improvements upon the Licensed Premises, provided that such additional buildings, structures and improvements and alterations shall not be installed, erected, constructed or made except in accordance with (a) plans and specifications previously submitted to the General Manager and approved in writing by him, and (b) the covenants, conditions and agreements of this Agreement. Said approval shall not be unreasonably withheld.

5. *RENTAL.*

a. *Rental of Leased Premises.*

(1) *Parcel 1.* Lessee shall pay to City, as rental for the use of Parcel 1, the sum of Three Thousand Six Hundred Nineteen and 93/100 Dollars ($3,619.93) per month, in advance, on the first day of each calendar month while this Agreement is in effect.

(2) *Parcels 2 and 3.* Lessee shall pay to City, as rental for the use of Parcels 2 and 3, the sum of Two Thousand Five Hundred Fifty-Two and 58/100 Dollars ($2,552.58) per month, in advance, on the first day of each calendar month while this Agreement is in effect. * * *

(4) The foregoing rental for said Parcels 1, 2 and 3 shall be in lieu of tariff charges assessed by City in accordance with applicable Port of Long Beach tariffs, as hereinafter mentioned, but tariff charges shall be applicable when accruing in connection with Lessee's operations upon the Licensed and Assigned Premises as provided in Paragraph 7 herein.

b. *Rental of Licensed Premises.* Lessee shall pay to City, as rental for the use of the Licensed Premises, a sum computed from the pipeline rental fees prescribed in Section 7560.9 of the Municipal Code of the City of Long Beach, at the annual rates, in cents, per inch of nominal diameter (not including protective casing) per lineal foot per year of the pipelines installed and maintained pursuant to this Agreement, subject to such annual fee adjustments resulting from the application of the provisions of said Section 7560.9, as directed by the Board of Harbor Commissioners. Said Section 7560.9 provides for an annual adjustment of the base rates set forth therein, based on the "Index Number of Wholesale Prices" of the United States Bureau of Labor Statistics.

Said rental for the Licensed Premises shall be paid annually in advance; and in the event of an installation or removal or abandonment of pipeline facilities during an annual period, the payments otherwise due City for use of said Licensed Premises by such facilities shall be prorated for said annual period as of the end of the calendar month in which such installation, removal or abandonment is approved by City's Board of Harbor Commissioners. After

Lessee has completed each installation or abandonment of pipelines on the Licensed Premises, the rental may be adjusted on the basis of the actual length of pipelines in place in accordance with the lengths depicted on the "as-built" drawings to be furnished by Lessee.

* * *

7. *TARIFF CHARGES.* Lesseee shall pay, or cause to be paid, to City the total amount of all applicable charges accruing in connection with Lessee's operations upon the Licensed Premises and the Assigned Premises (including, but not limited to, wharfage, wharf demurrage, wharf storage and dockage) under the schedule of rates covering the use of wharves and wharf premises and other facilities and appliances owned, controlled or operated by the City of Long Beach, as the same have been or may be prescribed by the Board of Harbor Commissioners of the City of Long Beach in Port of Long Beach Tariff No. 3, as the same may exist or may be hereafter amended, or the successor to such tariff, or otherwise by law.

In connection with the payment of said tariff charges, Lessee shall file, or cause to be filed, statements as follows: (a) On or before the twentieth day following the departure of each vessel docking at berths in the Port of Long Beach served by Lessee's bunkering facilities, Lessee shall file, or cause to be filed, with the General Manager, on forms approved by City, a statement verified by the oath of Lessee's manager or other duly authorized representative, showing all charges which shall have accrued at said premises for dockage, wharfage and other applicable charges with reference to each such vessel; (b) On or before the tenth day of each month, Lessee shall file, or cause to be filed, with the General Manager, on forms approved by City, a statement verified by the oath of Lessee's manager or other duly authorized representative, showing all charges which shall have accrued at said premises for wharfage where the departure of a vessel is not involved, and for all wharf de-

murrage, storage and other charges, if any, during the preceding calendar month.

Lessee shall keep full and accurate records relating to its operations on said Leased, Licensed and Assigned Premises, and the records which are pertinent to the provisions of this Agreement shall be subject to inspection by representatives of City at any and all reasonable times during normal business hours, and copies may be made of any and all such records.

City agrees that it will not, during the term of this Agreement, control or limit any charge Lessee may make any of its customers for, or based upon, transportation of any fuel oil, diesel fuel, crude oil, or other petroleum products, chemicals, liquids or dry cargo commonly used or dealt in by those engaged in the petroleum industry, within or across the Leased, Licensed or Assigned Premises (this does not pertain to dockage or wharfage).

* * *

9. *DUTY TO REPAIR AND RESTORE.* Except as otherwise provided herein, Lessee shall operate, keep and maintain the Leased Premises and all improvements thereon, whether owned by City or Lessee, in good and substantial repair and condition, and shall make all necessary repairs and alterations thereto and perform all necessary maintenance thereof, all at its sole cost and expense.

Except as provided herein, City shall not be required at any time to make any improvements or repairs, or perform any maintenance whatsoever, on or for the benefit of the Leased, Licensed or Assigned Premises or any improvements of any kind constructed, erected or installed thereon.

Lessee agrees to provide proper containers for trash and to keep the Leased, Licensed and Assigned Premises free and clear of rubbish, debris and litter resulting from its operations at all times, and to keep and maintain all of said premises in a safe, clean, wholesome and sanitary

condition under all applicable federal, state, municipal and other laws, ordinances, rules and regulations. No offensive or refuse matter, nor any substance constituting any unnecessary, unreasonable or unlawful fire hazard, nor material detrimental to the public health, shall ever be permitted to be or remain on or be disposed of in water adjacent to the Leased, Licensed or Assigned Premises, and Lessee shall prevent such material or matter from being or accumulating upon said premises.

Upon the termination of this Agreement, whether by expiration or otherwise, all improvements of Lessee located on the Leased, Licensed or Assigned Premises shall, at the option of City, be removed by Lessee at Lessee's sole cost and expense; and Lessee shall restore the Leased Premises to a smooth graded, unimproved state and restore the Licensed Premises to the condition the same were in immediately prior to the commencement of such removal. City shall give written notice to Lessee of City's election, with respect to removal of the improvements, not later than ninety (90) days prior to the termination of this Agreement. City may so elect for Lessee to remove a portion or portions only of the improvements and, in such case, Lessee shall remove only the portion or portions specified by City in its written notice of election. All pipelines not removed pursuant to City's election shall be abandoned in place in accordance with the conditions specified by the General Manager.

10. *SPECIAL PROVISIONS RELATING TO THE LICENSED PREMISES.*

a. *Installation of Pipelines.* Lessee shall install pipelines underground or beneath the wharf apron at the schematic locations shown on said Harbor Department Drawings HD 3-149-1, HD 3-149-2 and HD 3-149-3, and at elevations and locations approved in writing by the General Manager. The pipelines hereby authorized shall be in-

stalled only in accordance with plans and specifications previously submitted to the General Manager of the Harbor Department with the application for this permit and as approved by him. * * * Relocation or alteration of other underground pipelines, and installations of any kind or nature, whether above or below ground, and whether owned by City or by third parties, required in connection with Lessee's installation of its pipelines and facilities shall be at the sole cost and expense of Lessee.

* * *

d. *Use of Lands by City.* City, its successors and assigns, shall have full use and enjoyment of the Licensed Premises, except as to the rights and privileges hereby granted to Lessee.

e. *Permit Not Exclusive.* The license and permit hereby granted for the construction, operation and maintenance of ships' fuel oil-bunkering services by said pipelines shall be exclusive. However, City reserves the right to grant to other persons, firms or corporations licenses and permits to lay, maintain, operate, repair, renew, and remove pipelines other than for ships' fuel-bunkering services.

f. *Alterations.* Lessee shall, at its own cost and expense, alter said pipelines and change the location thereof whenever and as often as City deems it convenient or necessary on account of any construction authorized, permitted or contemplated by City, and Lessee shall commence such alteration or change of location, or both, within thirty (30) days after the receipt of a written notice from City so to do and shall proceed to complete the same with due diligence thereafter; provided, however, that after the original location has been approved by City, the expense of alteration and relocation of a pipeline for the sole convenience of per-

sons other than City and Lessee shall be borne by such others.

* * *

g. *Repairs to Pipelines.* Whenever the pipelines shall suffer failure or incur damage which will cause or permit the escape of the contents therefrom, it shall be the duty of Lessee to immediately make such repairs as will insure the future safe and proper operation of said pipelines and facilities, and Lessee shall make such cleanup and repairs as shall be required by City. Lessee shall also be responsible for the repair or replacement of any property and facilities caused to be damaged by the occurrence of the escape of the contents from the pipelines.

h. *Subject to Encumbrances.* This license and permit is granted subject to any and all existing leases, easements, licenses, permits or other encumbrances, and City reserves the right to grant further permits, licenses, easements, franchises or leases in, over, upon, along or across the Licensed Premises and the Optional Licensed Premises for purposes other than ships' fuel oil-bunkering services. City reserves the right to dedicate the Licensed Premises, the Optional Licensed Premises, or any part thereof, or to grant an easement across said Licensed Premises, Optional Licensed Premises, or any part thereof, for street purposes. Lessee shall not be liable for rental for the immediate area affected to the extent that, during any rental period, it is so prevented from exercising its rights hereunder as to such area. All such further permits, licenses, easements, franchises and leases shall be so located that a minimum of interference with Lessee's use of the premises covered by this Agreement is encountered.

i. *City Not to Incur Expense.* City shall not, at any time or under any circumstances, be required to construct, reconstruct, maintain or repair the pipelines, appliances, attachments, or appurtenances thereto installed by Lessee upon the Leased Premises, the Licensed Premises, the Op-

tional Licensed Premises, the Assigned Premises, or any part thereof, or to incur any expense or obligation or become liable for any damages whatsoever on account thereof except expense, obligation or damage arising from the sole negligence of City, its officers, agents or employees.

11. *INDEMNIFICATION.* Lessee shall indemnify, hold, protect and save harmless the City of Long Beach and any and all of its boards, officers and employees, from and against any and all actions, suits, proceedings, claims and demands, loss, liens, cost, expense and liability, of any kind or nature whatsoever, for injury to or death of persons or damage to property (including property owned by said City), which may be brought, made, filed against, imposed upon or sustained by said City, its boards, officers or employees, and which, in whole or in part, arise from or are attributable to or are caused, directly or indirectly, through negligence or otherwise, by the use of, or operations conducted upon, the Leased Premises, the Licensed Premises, the Optional Licensed Premises, the Assigned Premises or any portions thereof, or all, whether such use or operation be made or performed by Lessee, its officers, agents or employees, or by any person or persons acting with the knowledge and consent, express or implied, of Lessee, except claims and liabilities arising from the sole negligence of City, its officers, agents or employees.

12. *DESTRUCTION OR DAMAGE TO LESSEE'S IMPROVEMENTS.* In the event of destruction or damage to the improvements constructed, erected or installed by Lessee hereunder, by fire or any of the hazards covered by a standard form of fire insurance policy bearing an extended coverage endorsement, or by any other cause, said improvements shall be restored by Lessee, with reasonable diligence, to a condition suitable for Lessee's use; or Lessee, at its option, shall have the right to terminate this Agreement by written notice to City. In the event Lessee exercises its option to terminate this Agreement, or should

Lessee fail to restore said improvements with reasonable diligence, the Leased Premises and pipeline rights of way shall be restored as herein provided in Paragraph 9, and Lessee agrees to surrender all of said Premises to City.

13. *RIGHTS OF WAY AND ENCUMBRANCES.* This license and permit is granted subject to rights of way and entry upon the Leased, Licensed and Assigned Premises for the installation, relocation, removal, operation, and maintenance of sewers, pipelines, conduits and telephone, telegraph, light, heat or power lines, whether underground or overhead, as may from time to time be determined by the Board of Harbor Commissioners, as provided in subsection (f) of Section 229a of the Charter of the City of Long Beach. Said rights of way shall be so located that a minimum of interference with Lessee's use of the Leased, Licensed and Assigned Premises is encountered.

* * *

16. *UTILITY SERVICES.* Lessee shall provide, at its own expense, all utility installations and services required by Lessee upon the Leased Premises, including connections to the nearest gas, sewer, telephone, electric and water lines at points designated by City, and Lessee shall pay, before delinquent, all utility costs and charges required or used by it in connection with its use of the Leased, Licensed and Assigned Premises.

* * *

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed with all the formalities required by law on the respective dates set forth opposite their signatures:

[Subscriptions and attachments omitted in printing]

COUNTY OF LOS ANGELES LEASE

LEASE

THIS LEASE Made this day of , 1961, by the County of Los Angeles, hereinafter called "County", ~~and~~ [name of lessee deleted in original], hereinafter called "Lessee," WITNESSETH:

That in consideration of the terms, conditions, and covenants herein contained, to be kept and performed by the parties hereto and the strict, prompt and punctual performance of each of the terms, conditions, and covenants by Lessee on his part agreed to be kept and performed, County by these presents does lease and demise unto Lessee, and Lessee by these presents does lease, hire, and take from County the following described parcel or parcels of land or water, consisting of a total of 297,500 square feet and situated in the Marina del Rey Small Craft Harbor of the County of Los Angeles, State of California, more particularly described as follows, to-wit: Parcel Number Fourteen (14) more particularly described in Exhibit "A" attached hereto and incorporated herein.

TO HAVE AND TO HOLD said leased premises for the term of this lease and upon terms and conditions as follows:

1. DEFINITION OF TERMS

The following words have in this lease the significance attached to them in this paragraph, unless otherwise apparent from the context:

"BOARD" means the Board of Supervisors of the County of Los Angeles.

"COUNTY" means the County of Los Angeles.

"DEPARTMENT" means the Department of Small Craft Harbors of the County of Los Angeles.

"DIRECTOR" means the Director of the Department of Small Craft Harbors of the County of Los Angeles.

The words "SHALL" and "WILL" are mandatory and the word "MAY" is permissive.

The word "SECTION" means a section of this lease.

The word "PROPERTY" includes both real and personal property.

The word "SUBLEASE" includes licensee, permittee, concessionaire, assignee or transferee of or from Lessee with respect to any interest in the property demised under this lease.

* * *

2. TERM.

The term of this lease shall be sixty (60) years, commencing upon the eighth (8th) day of June A.D. 1961.

3. PURPOSE OR USE OF PROPERTY.

The leased premises shall be used only and exclusively for anchorage and related uses and for purposes incidental thereto; and for no other purposes whatsoever without the written approval of County; the uses and purposes above listed are set forth to define the maximum contemplated scope of permissible uses and purposes, and their enumeration is not intended to be authorization for any specific use or purpose.

It is also expressly understood that the uses of the said premises which are permitted hereinabove do *not* include the following:

A—Fuel sales

B—Repairs other than minor servicing or owner maintenance

C—Live bait sales

D—Sportfishing or charter boat activity

There shall be no actual construction upon said premises except that required by Sections 5 and 6 hereof, and except that additional construction allowed upon approval of Director pursuant to Section 9 hereof.

The Lessee shall conform to and abide by all rules and regulations relating to the operations herein authorized and shall be subject at all times to the rules and regulations adopted by the Los Angeles County Department of Forester and Fire Warden or the Department, ordinances of the County of Los Angeles, and all Statutes and administrative rules and regulations of the Federal Government and the State of California applicable thereto, and where permits are required for such operations, the same must first be had and obtained from the Los Angeles County Forester and Fire Warden or other regulatory body having jurisdiction thereof before such operations are undertaken.

4. ACTIVE PUBLIC USE.

The ultimate object of this lease is the complete and continuous use of the premises herein demised by and for the benefit of the public, without discrimination as to race or religion, the immediate object being the development and realization of the greatest possible revenue therefrom. It is agreed that said immediate and ultimate objects are consistent and compatible. Accordingly, Lessee covenants and agrees that he will operate said premises fully and continuously to the end that the public may enjoy maximum benefits and County may obtain maximum revenue therefrom.

* * *

5. PLANS AND SPECIFICATIONS FOR REQUIRED CONSTRUCTION.

Prior to commencing construction and within one hundred twenty (120) days after the commencement of the term of this lease, for water uses and sanitary facilities required thereby, and one hundred twenty (120) days after the commencement of the term of this lease and for uses other than water uses and sanitary facilities required thereby, Lessee shall file with Department six (6) sets of final plans and specifications for the construction of the following improvements upon the aforesaid premises: anchorage and related

uses the cost of which land and water improvements shall not be less than the total sum of Five hundred seventy thousand and 00/100 Dollars ($570,000.00) in combination with Parcels Eleven (11) and Thirteen (13).

Such final plans and specifications shall conform to the minimum standards of construction and architectural treatment for Marina del Rey Small Craft Harbor as adopted by the Board on January 3, 1961, and shall be subject to approval by Director and the County Engineer. No construction shall begin until said Director and Engineer have approved said final plans and specifications.

No modification of the approved plans and specifications or of said improvements, including landscaping, shall be made by Lessee without the prior approval of said Director and Engineer.

6. REQUIRED CONSTRUCTION SCHEDULE.

Lessee expressly covenants and agrees that within Forty-five (45) days after the approval of the final plans and specifications for water uses and sanitary facilities required thereby as provided for in Section 5 and that within Sixty (60) days after the approval of final plans and specifications for uses other than water uses and sanitary facilities required thereby as provided for in Section 5, Lessee shall in good faith commence construction of the improvements described therein, including required underground laterals for power, light, telephone, television, sewer, water (including fire lines) and gas lines, and landscaping, in accordance with said approved plans and specifications, and shall diligently prosecute such construction and shall complete the same not later than Three hundred (300) days thereafter for water uses and sanitary facilities required thereby and Seven hundred thirty (730) days thereafter for uses other than water uses and sanitary facilities required thereby; provided that any delay in construction due to fire, earth-

quake, war, labor dispute, or other event beyond control of Lessee shall extent the time in which said construction must be completed by the length of time of such delay.

Failure of Lessee to commence said work within said time shall, upon written notice thereof to Lessee by Board, ispo facto effect a forfeiture of this lease and all rights of Lessee thereunder.

* * *

9. ADDITIONAL CONSTRUCTION.

Lessee may, at its own expense, make or construct, or cause to be made or constructed, improvements other than those required by Sections 5 and 6, additions, alterations, repairs, or changes in the leased premises provided such proposed improvements, additions, alterations, repairs, or changes are within the scope of permissible uses set forth in Section 3, and further provided that each specific proposed improvement, addition, alteration, repair, or change must first have the written approval of Director.

* * *

10. LANDSCAPING.

Lessee shall, at its own cost and expense and to the satisfaction of County, install and maintain landscaping upon the demised premises. A general layout of proposed landscaping shall be submitted as part of the plans and specifications for all proposed improvements of the site. This will include the landscaping of all areas between any street and set back lines and such other areas as are necessary to create a pleasing development of the project as a whole. All landscaping plans and layout must have the approval of Director.

* * *

12. GROSS RECEIPTS.

The term "gross receipts" as used in this lease is defined to be all money, cash, receipts, assets, property, or other things of value, including but not limited to, gross charges,

sales, rentals, fees, and commissions made or earned, and all gross sums received or earned by Lessee, his assignees, sublessees, licensees, permittees, or concessionaires, whether collected or accrued, from any business, use or occupation, or any combination thereof, originating, transacted, or performed, in whole or in part, on the premises, including but not limited to, rental, the rendition or supplying of services, and the sale of goods, wares, or merchandise; less sales and excise taxes applicable thereto, required to be collected by Lessee, his assignees, sublessees, licensees, and permittees in connection with the rendering or supplying of services or goods, wares, or merchandise.

There shall be no deduction from gross receipts for any overhead or cost or expense of operation, such as, but without limitation to, salaries, wages, cost of goods, interest, debt amortization, discount, collection, credit card and bad debt charges, insurance, and taxes, except as specifically provided for herein.

Gross receipts shall include the amount of any manufacturer's or importer's excise tax included in the prices of any property or material sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge. Gross receipts, however, shall not include Federal, State, Municipal or other taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid periodically by Lessee to a governmental agency, accompanied by a tax return or statement, but the amount of such taxes shall be shown on the books and records elsewhere herein required to be maintained.

13. SQUARE FOOT AND HOLDING RENTALS.

Lessee shall pay to County an annual square foot rental in twelve (12) equal monthly installments. Said installments shall be due and payable in advance upon the first

day of each calendar month, starting with the calendar month next succeeding the date of substantial completion of the improvements required to be constructed pursuant to Sections 5 and 6, or starting with the calendar month next succeeding the commencement of use by the public of any of the improvements required to be constructed pursuant to Sections 5 and 6 or of any portion of the premises herein demised.

* * *

The aforesaid annual square foot rental for the whole of the premises herein demised shall be eight and one-half cents ($0.085) per square foot of water area and eight and one-half cents ($0.085) per square foot of land area, or the total of Twenty-five thousand two hundred eighty-seven and 50/100 Dollars ($25,287.50).

Prior to the start of square foot rental payments as in this section above provided for, Lessee shall pay to County each month in advance a "holding rental" consisting of one-third of the contemplated total monthly installment of square foot rental, starting on the eighth (8th) day of June, 1961. In the event of the start of proportionate square foot rentals under a program of progressive completion, as in this section above provided for, the "holding rental" shall be abated for that portion of the completed improvements and adjoining area thus made subject to square foot rental.

* * *

14. PERCENTAGE RENTALS.

The square foot rental agreed upon in Section 13 is a minimum rental, payable in lawful money of the United States. The money received as square foot rental for any calendar month shall be applied to the payment of the percentage rental for said calendar month as provided for in this Section 14.

Within fifteen (15) days after the close of each and every calendar month of the term hereof, Lessee shall pay to County a sum in like money, less the amount of the monthly

installment of annual square foot rental previously paid for said calendar month under Section 13, and during the first five years of the term hereof, also less the credit for improvements hereinafter in this Section 14 provided for, equal to the total of the following for said previous calendar month:

(a) TWENTY Per Cent (20%) of gross receipts from the rental of boat slips, anchorage tie-ups, or storage areas;

(b) TWENTY-FIVE Per Cent (25%) of gross receipts from the launching and retrieving of small boats;

(c) TWENTY-FIVE Per Cent (25%) of gross receipts from the dry storage of boats;

(d) SIX Per Cent (6%) of gross receipts from sales of used boats, ship chandlery supplies, fishing tackle, paints, varnishes, and similar commodities, and from commissions from the sale of new boats;

(e) SIX Per Cent (6%) of gross receipts from boat haulout, repair, painting, and similar activities;

(f) TWENTY Per Cent (20%) of gross receipts from insurance sales or boat sale brokerages;

(g) TWO Cents ($0.02) per each gallon of gasoline sold;

(h) ONE AND ONE-HALF Cents ($0.015) per each gal. of diesel fuel sold;

(i) THREE Cents ($0.03) per each gal. of mixed fuel sold;

(j) FIVE Per Cent (5%) of gross receipts from sale of petroleum or fuel products other than those covered by subparagraphs (g), (h), and (i) above;

(k) FIVE Per Cent (5%) of gross receipts from the sale of food or food products and alcoholic or other beverages served on the demised premises or prepared on the premises and served off the premises;

(l) SIX Per Cent (6%) of gross receipts from the sale of packaged liquor;

(m) TEN Per Cent (10%) of gross receipts from the sale of alcoholic or other beverages prepared and served on the demised premises or prepared on the premises and served off the premises when no food or food products are prepared and served therewith;

(n) FIFTEEN Per Cent (15%) of gross receipts from club initiation fees and club dues;

(o) FIFTEEN Per Cent (15%) of gross receipts from the rental of hotel rooms, guest rooms, meeting rooms, or other similar space;

(p) TWENTY Per Cent (20%) of gross receipts from rentals or other fees charged for use of trailer-cabana sites, motels, boatels, and cabanas;

(q) TWENTY Per Cent (20%) of gross receipts from parking fees;

(r) SIX Per Cent (6%) of gross receipts from the operation of sports fishing boats;

(s) SIX Per Cent (6%) of gross receipts from miscellaneous activities such as sportswear shops, beauty shops, specialty food shops, and gift shops;

(t) FIVE Per Cent (5%) of gross receipts from coin vending machines;

(u) TWENTY-FIVE Per Cent (25%) of gross receipts received by Lessee from the telephone company as compensation for pay telephones located on the leasehold;

(v) TWENTY Per Cent (20%) of gross receipts from any and all service charges or labor charges;

(w) TEN Per Cent (10%) of gross receipts from apartment rentals;

(x) FIVE Per Cent (5%) of gross receipts from all other activities carried on on said premises.

During the first five (5) years of the term hereof, Lessee shall be allowed a credit each calendar month upon the payment of the percentage rental hereinbefore in this Section 14 required, in the amount of one-half of the total of said percentage rental due hereunder for said calendar month in excess of the minimum square foot rental installment previously paid for said calendar month; the total of said monthly credits shall not exceed the minimum required money expenditure for improvements specified and required to be constructed pursuant to Section 5 hereof.

If the total of the percentages of gross receipts agreed to be paid by Lessee for any calendar year exceeds the sum of the Square Foot Rental, but is less than the total of monthly payments actually made by the Lessee for said calendar year, Lessee shall be allowed credit at the end of said calendar year for the difference between the said total of percentages agreed to be paid and said total of payments actually made.

If any of the items, services, goods or facilities mentioned in subparagraphs (a) through (x) of this paragraph be provided by Lessee or its sublessees, assignees, licensees, concessionaires, or permittees, without the usual charges therefor according to the price list or schedule provided for in Section 16, or if said usual charge be not collected in full, the proper amount thereof shall nevertheless be included in the gross receipts reported by Lessee and its sublessees, assignees, licensees, concessionaires, and permittees, and the applicable percentage thereof paid to County.

15. RENT RENEGOTIATION AND ARBITRATION. The square foot and percentage rentals hereinbefore provided for shall apply to and be in effect for the first five (5) years of the term hereof. The square foot and percentage rentals for the remainder of said term shall,

be determined by renegotiation and arbitration, as hereinafter provided, without limit as to amount, except that at all times during the term of this lease the total rentals shall be in such amount that the property hereby demised shall produce at least its proportionate share of the revenue required by Government Code, Section 26360 and the revenue required to meet the obligations of County under that certain Revenue Bond Resolution of the County Board of Supervisors referred to in Section 46; and, notwithstanding the renegotiation and arbitration provisions of this Section 15, the minimum rental under this lease shall never be lower than the product of six cents ($0.06) multiplied by the square feet of the leased land and water area.

The rentals for the remainder of said term shall be readjusted as follows for each succeeding period of ten (10) years;

Such rentals shall be readjusted by Lessee and County, in accordance with standards of and for fair market value hereinafter set forth, at some time not more than nine (9) months and not less than six (6) months before the beginning of each such ten-year period; in the event Lessee and County cannot agree upon the readjustment of rentals, the same shall be determined by a board of three (3) real estate appraisers, one of whom shall be appointed by County, one by Lessee, and the third by the two (2) appraisers so appointed.

* * *

The board of real estate appraisers shall, immediately upon the appointment of its members, enter upon the discharge of its duties and determine the amount of readjusted rentals and notify the parties thereof in writing within sixty (60) days after its appointment. A majority of the real estate appraisers who agree thereto may readjust such rentals, such readjustment to be based upon a determination of the fair market value of this lease, taking into consideration the uses permitted thereunder and all of

its terms, conditions, and restrictions, franchise value, earning power, and all of the factors and data relating to such value required or proper to be considered in determining the fair market value of leaseholds under the laws of eminent domain in the State of California; also provided that at all times during the term of this lease the total of such rentals shall be in such amount that the property hereby demised shall produce at least its proportionate share of the revenue required by Government Code, Section 26360 and the revenue required to meet the obligations of County under that certain Revenue Bond Resolution of the County Board of Supervisors referred to in Section 46; and, notwithstanding the renegotiation and arbitration provisions of this Section 15, the minimum rental under this lease shall never be lower than the product of six cents ($0.06) multiplied by the square feet of the leased land and water area. * * *

18. DISPOSITION OF INSTALLATIONS OR IMPROVEMENTS.

Title to all structures, buildings, or improvements constructed by Lessee upon the demised premises, and all alterations, additions or betterments thereto, shall remain in Lessee until termination of this lease; and upon such termination, whether by expiration of the term hereof, cancellation for good cause, forfeiture, or otherwise, title to said structures, buildings, improvements, and all alterations, additions, or betterments thereto, and all improvements made to or upon said premises, shall, at the option of County, vest in County without compensation therefor to Lessee, and said structures, buildings, and improvements shall remain upon and be surrendered with the premises as part thereof.

However, County may require Lessee, prior to the expiration of the term of this lease, or any sooner termination of this lease, to remove, at the sole cost and expense of Les-

see, all works, structures, and improvements of any kind whatsoever placed or maintained on said premises, whether below, on, or above the ground by Lessee or others, including, but not limited to, wharves, piers, docks, slips, bulkheads, seawalls, piling, channels, concrete foundations, structures, and buildings; and Lessee shall, upon the expiration of the term of this lease or upon any sooner termination of this lease, immediately restore, and quit, and peacefully surrender possession of, said premises to County in at least as good and usable a condition, acceptable to the Director, as the same were in at the time of first occupation thereof by Lessee or others, ordinary wear and tear excepted, and shall, in any event, leave the surface of the ground in a level, graded condition, with no excavations, holes, hollows, hills, or humps. Should Lessee fail to so remove said structures, buildings, and improvements and restore said premises, County may sell, remove, or demolish the same, in event of which sale, removal, or demolition Lessee shall reimburse County for any cost or expense thereof in excess of any consideration received by County as a result of such sale, removal, or demolition.

* * *

Title to all utility lines, switchboards, transformer vaults, and all other service facilities constructed or installed by Lessee upon the demised premises shall vest in County upon construction or installation.

* * *

26. INDEMNITY CLAUSE AND CASUALTY INSURANCE.

Lessee shall at all times relieve, indemnify, protect and save harmless County and its Boards, officers, agents, and employees from any and all claims and liability, including expenses incurred in defending against the same, for the death of or injury to persons or damage to property, including property owned or controlled by or in the possession of County, or any of its officers, agents, or employees,

that may in whole or in part arise from or be caused by (a) the operation, maintenance, use, or occupation of the herein demised premises by Lessee, (b) the acts, omissions, or negligence of Lessee, its agents, officers, employees, or permittees, or (c) the failure of Lessee to observe or abide by any of the terms and conditions of this lease or any applicable law, ordinance, rule, or regulation; the obligation of Lessee to so relieve, indemnify, protect and save harmless County, and each of its Boards, officers, and employees, shall continue during any periods of occupancy of or holding over by Lessee, its agents, officers, employees, or permittees, beyond the expiration or other termination of this lease.

* * *

35. MAINTENANCE OF PREMISES.

Lessee shall give prompt notice to County of any fire or damage that may occur from any cause whatsoever. Lessee shall, to the satisfaction of Director, keep and maintain the leased premises and all improvements of any kind which may be erected, installed, or made thereon by Lessee in good and substantial repair and condition, including painting, and shall make all necessary repairs and alterations thereto.

County shall not at any time be required to make any improvements or repairs whatsoever except that County may at its sole discretion do any necessary dredging, filling, grading, slope protecting, construction of sea walls, or repair of water system, sewer facilities, roads, or other County facilities in order to protect the leased premises or the adjoining premises.

Lessee expressly agrees to maintain the leasehold in a safe, clean, wholesome, and sanitary condition, to the complete satisfaction of Director and in compliance with all applicable law. Lessee further agrees to provide proper containers for trash and garbage and to keep the demised premises, both land and water areas thereof, free and clear

of rubbish and litter. County shall have the right to enter upon and inspect the said premises at any time for cleanliness and safety.

36. REPAIRS BY COUNTY.

Lessee shall from time to time make any and all necessary repairs to or replacement of any equipment, structure, structures, or other physical improvements, upon the demised premises, in order to comply with any and all regulations, laws, or ordinances of the State of California, County of Los Angeles, City of Los Angeles, or other governmental body, which may be applicable.

If Lessee fails to make any such repairs or replacements as required, County may notify Lessee of said default in writing, and should Lessee fail to cure said default and make said repairs or replacements within a reasonable time as established by County, County may make such repairs or replacements and the cost thereof, including, but not limited to, the cost of labor, materials, and equipment, shall be charged against Lessee and shall be paid to County by Lessee.

37. SPECIAL SERVICES.

In addition to the rental charges as herein provided, Lessee shall pay all service charges for furnishing water, power, sewage disposal, light, telephone service, garbage, and trash collection, and all other utilities, to said premises.

* * *

41. RULES AND REGULATIONS.

Leases shall abide by all applicable rules, regulations, resolutions, ordinances, and statutes of the County of Los Angeles, the City of Los Angeles, and the State of California, or other governmental body, where applicable, respecting the use, operation, maintenance, repair, or improvement of the leased premises and equipment, and shall

pay for any and all licenses required in connection with the use, operation, maintenance, repair, or improvement of the leased premises.

* * *

[Subscriptions omitted in original]

STUDY BY URBAN PROPERTY RESEARCH COMPANY

Study of Land Rental Rates and Returns
Being Received on Other High Grade Investments for
State of California States Land Commission

[Letterhead]

January 31, 1975

State of California
State Lands Commission
1807 13th Street
Sacramento, California 95814

Attention: Leslie H. Grimes

SUBJECT: Study of Land Rental Rates

Gentlemen:

In accordance with your authorization, I have prepared a study involving review and analysis of rental rates being secured on commercial, industrial and marina land. The study includes various recommendations together with the reasoning upon which these recommendations are predicated.

Also considered in the study is an analysis and comparison of rates of return being received from Aaa bonds and from land leases.

Respectfully Submitted,

URBAN PROPERTY
RESEARCH COMPANY

/s/ THOMAS W. CLARK, JR.
Thomas W. Clark, Jr., M.A.I.

TWC/jn

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

I. On commercial and industrial land leases where the annual rental is established by a fair market value appraisal to which is applied a rate of return, it is recommended that the annual rental rate of return be 8%.

II. Analysis and comparison of the difference between land lease rates and interest rates being secured on Aaa bonds indicate that the composition of the rate of return is different, and there is not necessarily a significant correlation between the two. It is recommended, therefore, that interest rates on Aaa bonds not be used to determine a rental rate for land leases.

III. It is recommended that serious consideration be given to applying the percentage of gross sales to establish the rental rate for large marina lands and that a simplified method be established using county assessor data to estimate land rents for small "Mom and Pop" marinas.

IV. It is recommended that a review of current rental rates be made every two to four years and that provisions be made in leases for increasing annual rentals either by reevaluation of the property or by tieing the rent to some governmental index.

CERTIFICATION

The undersigned does hereby certify that in this study:

1. I have no personal interest or bias with respect to the subject matter of this report or the parties involved.

2. To the best of my knowledge and belief the statement of fact contained in this study upon which the analyses, opinions and conclusions expressed are based are true and correct.

3. No one other than the undersigned prepared the analyses, conclusions and opinions concerning real estate that are set forth in this report.

/s/ THOMAS W. CLARK, JR.
Thomas W. Clark, Jr., M.A.I.

SCOPE OF STUDY

The purpose of this study is to aid the staff of the State Lands Commission in estimating a reasonable rental rate or rate of return to be applied to land leases involving state lands under their jurisdiction.

Primary emphasis has been on an investigation of market data involving land leases in both the public and private sector of the economy. The majority of the leases, however, are of lands owned by public agencies such as port districts, cities and the State of California since they have more land available for lease than private corporations. Also included in the report is market data relating to percentage leases with regard to marina land. This data can be related to marina land leases in the Sacramento-San Joaquin Delta and at Lake Tahoe.

A comparison of yields being secured on high grade corporate and governmental bonds has also been analyzed and an attempt made to correlate the return on this type of investment with those being received from land leases. Included in this section are some of the current economic theories relating to the real value of money, the effect of inflation and risk. While these theories yield some light on a proper rate of return for a given type investment and tend to explain the thinking of investors in the money market, it is difficult to directly correlate this data to a fair rate of return for leased lands.

The market and economic data investigated has been correlated and analyzed and recommendations made as to various approaches that are applicable to developing reasonable land rental rates and means of reviewing and updating the data.

ANALYSIS OF CURRENT LAND LEASES

Major emphasis in this study has been to collect and analyze market data relating to current land leases by both public agencies and private companies. In addition, the real estate representatives handling these transactions were in-

terviewed for the purpose of ascertaining their views of the current rental market and the rate of return they feel is reasonable in today's real estate market.

Although other areas of investigation are included in this report, the market data analysis is considered to be the most significant since it relates directly to real estate. Rates of return on other forms of investment while indicating some general interest rates do not directly apply since they involve essentially different forms of investment.

In nearly every situation investigated, the total rental is predicated on some form of market value appraisal to which has been applied a percentage rate to arrive at total annual rent. In some cases, a percentage of gross receipts versus a flat rental is included in the lease to protect the lessor's interest in the event the business enterprise is particularly successful. This is not the normal situation, however, and does not apply to industrial land leases. Further in all cases the data involve non-subordinated leases and range from a minimum term of one year to a maximum of sixty-six years.

In most cases involving long term leases, there is some provision in the lease for increases in the rental based on consumer or wholesale price indices, a reevaluation of the fair rental or escalating rentals over the term of the lease. This in effect insures the lessor that over a given period of time, he will receive a fair return on the value of the land leased and that he will be protected against inflation.

In some cases, particularly those involving Cal-Trans, the lease rate is lower during the initial years of the lease so that improvements made by the lessee which will eventually revert to the lessor can be amortized during the early stages of the lease. The net effect of this is that the rate of return received during the initial years of the lease are at a lower rate than those being received during the latter period of the lease. The overall attempt by Cal-Trans in these situations is, however, to receive an annual rate of 8% or better on the market value of the land leased. In

addition, many of the Cal-Trans leases involve land under freeways on which the state is trying to promote leases. Consequently, they are prone to offer attractive leases to attract others to lease land under freeways.

The public agencies from which data was secured include:

Cal-Trans (State of California)
City of Hayward Airport District
City of Richmond Port District
San Francisco Port Commission
Oakland Port Commission
San Diego Unified Port District
City of Los Angeles, Harbor District
City of San Diego
Major corporations investigated were:
Southern Pacific Transportation Company
Western Pacific Railroad
Standard Oil Company of California

Nearly all of the current market data secured was from the various public agencies. The primary reason for this is that these agencies are continually involved in the leasing of lands under their jurisdiction. The Southern Pacific Transportation Company and Western Pacific Railroad who own considerable property made limited market data available but were particularly helpful with regard to discussions of applicable rates of return that their companies require. Both Southern Pacific and Western Pacific Railroad are subject to real property taxes as established by the State Board of Equalization. Their total rental rate includes taxes. To arrive at the net rental, it is necessary to deduct the tax rate from the gross rental rate. Essentially, the taxes amount to 2½% to 3% of gross rental rate and both companies are trying to secure a net rate of return somewhere between 8% and 9% on leased lands. To achieve this, they must charge a gross rate of between 11% and 12%.

Standard Oil Company of California was also contacted and indicated that they are not currently leasing any of

their property at what would be considered a fair rental rate in today's market. Their policy is to dispose of the property by sale rather than retain the land and lease it. However, the Standard Oil representative did indicate that if they were to lease industrial or commercial property, they would require a minimum of 8% return on the fair market value of the land.

Almost without exception, the various agencies and companies are attempting to secure a rate at or near 8% of the fair market value of the land which, in their opinion, is a current fair rental rate. They did indicate that they felt that rates of return might increase over the next few years but this depends to some extent on inflation and rates of return being secured from alternative type investments.

In all instances in which a public agency was involved, the total rental was predicated on a rate of return applied against the estimated fair market value of the land based usually on formal written appraisals or occasionally opinions of the individuals involved in the leasing program.

The two railroads, however, use a somewhat different approach. Western Pacific in those instances where a portion of the operating right-of-way is leased, such as a lease to Standard Oil for pipeline use, predicate the value of the land on the State Board of Equalization's assessed valuation. Southern Pacific, on the other hand, leases land within their right-of-way on the basis of the cost of buying a substitute strip of land which would include in addition to the value of the raw land the cost of improvements within the right-of-way area and all other costs associated with acquisition. This was the basis of the value of the land that was leased to P. G. & E. for their Antioch to Concord pipeline. Nevertheless, both companies are attempting to secure 8% or more on an established land value.

The following is a tabulation of the market data considered reasonably relevant. More detailed data sheets are included in the Addenda of this report.

Lease No.	Lessor / Lessee	Lease Date	Term	Options	Land Value	Rent	Lease Rate
1	City of Richmond Canal Ind. Park	12/74	5 Yr	1-10 Yr	$ 410,000.	$ 32,796/ Yr Net	8%
2	City of Richmond Dorward Terminal Co.	8/73	20 Yr	None	365,000.	30,000/ Yr Net	8.2%
3	City of Richmond Pacific Molassis Co.	2/73	20 Yr	None	365,000.	30,000/ Yr Net	8.2%
4	City of Hayward Rinker Dev.	Lease Pending	50 Yr	None	735,000.	58,800/ Yr Net	8%
5	City of Hayward Richard Jeho	5/72	50 Yr	None	360,000.	21,600/ Yr Net	6%
6	City of Hayward Air Plaza West Inc.	11/71	50 Yr	None	104,640.	8,371/ Yr Net	8%
7	Cal-Trans, S.F. Mexican Imports	11/74	25 Yr	5-5 Yr	131,000.	10,200/ Yr Net	7.8%
8	Cal-Trans, S.F. Richard Summers	10/75	15 Yr	3-5 Yr	120,000.	9,600/ Yr Net	8%
9	Cal-Trans, S.F. Mariner Square	4/74	5 Yr	35 Yr	45,000.	3,300/ Yr Net	7.3%
10	Cal-Trans, S.F. W.B. Brodovsky	4/75	10 Yr	5-5 Yr	1[illegible],000.	9,000/ Yr Net	7.5%

Lease No.	Lessor / Lessee	Lease Date	Term	Options	Land Value	Rent	Lease Rate
11	Cal-Trans, S.F. Sisters of Providence	2/75	5 Yr	3-5 Yr	$ 115,950.	$ 9,240/ Yr Net	8%
12	Cal-Trans, Sacramento The Shed	3/74	10 Yr	3-5 Yr	136,750.	12,600/ Yr Net	9.2%
13	S.F. Port Comm Geo Burger	3/74	66 Yr	None	1,125,000.	86,940/ Yr Net	7.7%
14	S.F. Port Comm Francisco Bay Off. Park	6/74	66 Yr	None	1,882,000.	168,316/ Yr Net	8.9%
15	S.F. Port Comm Gerson Baker	11/72	66 Yr	None	704,500.	56,400/ Yr Net	8%
16	City of Oakland United Parcel Post	6/73	66 Yr	None	1,625,000.	120,000/ Yr Net	7.4%
17	City of Oakland David Robbins	12/74	25 Yr	2-10 Yr	120,000.	9,600/ Yr Net	8%
18	City of Oakland Continental Restaurant	4/73	15 Yr	2-5 Yr	147,500.	86,940/ Yr Net	8%
19	City of Oakland Oakland Village Corp.	8/72	35 Yr	2-10 Yr	460,000.	36,684/ Yr Net	8%
20	San. Diego Port Dixieline Lumber	8/74	1 Yr	None	288,957.	22,704/ Yr Net	7.9%

Lease No.	Lessor / Lessee	Lease Date	Term	Options	Land Value	Rent	Lease Rate
21	San Diego Port Shelter Island	12/74	1 Yr	None	$ 206,929.	$ 16,560/ Yr Net	8%
22	San Diego Port National Steel	5/74	1 Yr	None	951,787.	75,583/ Yr Net	7.9%
23	L.A. Port District General Amer. Trans.	1/74	5 Yr	None	453,334.	36,267/ Yr Net	8%
24	L.A. Port District Proctor and Gamble	10/74	5 Yr	None	453,595.	34,688/ Yr Net	7.6%
25	City of San Diego James R. Simpson	/75	55 Yr	None	1,090,000.	76,430/ Yr Net	7%
26	San Diego Port Dist. Elliott Pohl	12/74	1 Yr	None	206,929.	16,560/ Yr Net	8%
27	Cal-Trans, S.F. City of Oakland	10/74	5 Yr	2-5 Yr	440,000.	34,200/ Yr Net	7.8%
28	S.P. Trans. Co. P.G. & E.	9/74	20 Yr	1-5 Yr	833,333.	100,000/ Gross	12% Gross 9% Net
29	W.P. R.R. Standard Oil	1/75	20 Yr				12% Gross 9% Net

In summary, the lease data reveals a range between 6% and 9% as the fair rate of return for the properties leased but with the vast majority of leases being at or near 8%. Of even greater interest, however, was the opinion of the various management people interviewed. Almost all indicated that the reasonable rate of return for land leased is currently 8%. The reason for the variances in the annual rates being received are due to various factors some of which include the lease date or an attempt to give the lessee a lower rental during the first few years of the lease to allow him to recoup investment in improvements that will revert to the lessor at the end of the lease period.

The conclusion drawn from this data, therefore, is that the fair rate of return to be applied to the market value of the property is 8%.

RATES OF RETURN BEING RECEIVED ON Aaa BONDS

A review of rates of return being secured on Aaa Bonds indicate that interest rates being secured from these bonds depend on the remaining time period the bond has to maturity. As an example, American Telephone and Telegraph Company bonds maturing in the year 2005 are currently yielding an 8.6% return while G.M.A.C. Acceptance Corporation bonds maturing in 1980 also rated Aaa are only returning 5.8%. The difference in rate is primarily the result of the investing public's attempt to protect themselves against inflation. On long term bonds, the investor is obviously trying to compensate for economic factors affecting the economy. The shorter the period to maturity the less the risk of inflation.

Long term Aaa bonds have a specified reversionary interest at the end of the bond term (the face value of the bonds) and are tied to a specific interest rate (depending on the amount paid for the bond) during the term of the bond. Since these bonds are considered to have a low risk

rate, they tend to reflect an interest rate that is primarily a composite of a rate of return on money plus an anticipated annual inflation rate.

There is a good deal of scholarly support for the view that the "real" interest rate ordinarily hovers around 3% (That is a rate that is risk free and inflation and/or deflation free.) and that anything much higher reflects a premium for inflation and risk. Under this premise a long term high grade corporate bond yielding a 9% rate of return would reflect an inflationary rate of somewhere between 5% and 6%. Studies at the University of Chicago involving common stocks also tend to support this view. In this case, the risk rate is a major factor along with an inflation rate and the "real" interest rate. These studies considered the total return to be composed of dividend and enhancement in value over varying investment time periods. They conclude that the risk rate amounts to approximately 5% with a "real" rate of return at 3% and anything received above the summation of these two rates reflected in the inflationary factor.

Most land leases on the other hand are not subject to significant inflationary pressures since there are usually provisions in the lease for adjusting the rental rate periodically to reflect both inflationary factors and in many cases increase in basic land values.

Because of the difficulty in estimating the investment risk of a land lease, the risk factor is an important ingredient in the rate of return being received. At rates of return amounting to 8%, the risk rate, assuming "real" interest to be 3%, would probably range between 3½% and 4%. The difference being attributable to inflationary considerations.

Thus the composition of the rate of return being received on Aaa bonds and on real estate land leases is different and

while the rates may be in the same general range, they could conceivably vary considerably depending on economic factors in the money market.

Factors reflecting differences in the two types of investments, Aaa bonds and land leases, are:

1. With the purchase of a bond, the reversionary value is known since it amounts to the face value of the bond. In a real estate land lease, the reversionary value is unknown and is affected by a number of factors including value trends, location factors, governmental influences etc. For these reasons, there is a possibility of either an increase or decrease in value of real estate at the time the lease reverts to the owners. (A reversionary interest being the value of the land at the end of the lease period.)

2. Rates of return being secured on Aaa bonds can be significantly effected by the short term money market. During periods when short-term government securities and certificates of deposit are yielding between 9% and 10% as they have over the past year, interest rates on bonds are forced upward because of the competitive influence for money. The rates of return being received on real estate land lease are only minimally effected by short-term gyrations in the money market and relate more directly to long term trends of return. As indicated in the market data analyzed elsewhere in this report, land lease rates have only increased a small amount over the past 3 years. Bond rates, on the other hand, have increased much more significantly and short term rates in the money market have fluctuated fantastically.

3. During periods of tight money or while interest rates are increasing, the market value of the bond will vary accordingly. A bond yielding a 6% return on a face value of $1,000 can be sold for more than $1,000 if

interest rates in the money market are below 6% and will fall if the interest rate rises above 6%. (Assuming the bond has 20 or more years before maturity.) The value of real estate and the rates of return being received on real estate investments are not as significantly effected by the money market. Also it is much easier to ascertain the risk factor of a bond as compared to a real estate land lease. The risk factor in bonds is rated by such investment services as Moodys, Standard and Poors, both of which are readily available to the public. Real estate, on the other hand, is not rated by any investor service and the quality of the investment is not generally well established. This is true even if the lessee is a highly rated major corporation since the ultimate value of the reversion of the fee interest to the land owner is in doubt as long as there is a significant period before the lease terminates.

In summary, long term bond interest rates which reflect both capital demands and expectations about inflation have varied significantly over the past few years. Long term bond rates are also influenced to some extent by trends in the short term money market and by actions taken by the Federal Reserve Board. Land leases, on the other hand, do not fluctuate significantly in the short term and are only minimally affected by the short term money market. Also, bonds have an ascertainable reversionary value and after purchase are tied to a specific rate of return. Land leases, on the other hand, have an unknown reversionary value which is dictated by real estate values at the end of the lease, and in most cases land leases have provision for adjustment in the rental being received at various times by having escalator clauses and/or other provisions for adjustment in the total rent being paid.

Predicated on the basic differences between the two types of investments and because there is adequate market data reflecting land lease rates, it is recommended that rental

rates of return not be tied or compared to long term bond interest rates.

PERCENTAGE RENTAL RATES ON MARINA PROPERTIES

A review of market data involving marinas at various lakes in the state indicates that rental rates are typically predicated on a percentage of gross sales. These rental rates are nearly always established by a bidding process subject to a review of the bids by the agencies awarding the lease. In some instances, the lessee pays a rather low rate during the first few years of the lease term to allow him to recover the cost of improvements that must be made at his expense. In these leases the improvements revert to the lessor at the end of the lease period and sometimes reflect a significant value.

The following is a summary of various land leases administered by public agencies for marinas at various reservoirs.

Lease No. / Location	Lessor / Lessee	Lease Date	Term of Lease	Minimum Rent	Percentage Rent on Gross Sales	Petroleum Product
A Folsom Lake	State of Cal. Christensen	1/68	15 Yrs	$150/Mo	2% 1st $100,000. 4% 2nd $100,000.	$.01/Gal
B Lake Elsinor	State of Cal. Elsinor Rec. Area Inc.	8/70	25 Yrs	None	1% 1st $100,000. 2% 2nd $100,000. 3% Over $200,000.	None Special
C Lake Oroville	State of Cal. So. Cal. Financial	12/69	40 Yrs	None	3% 1st $500,000. 4% Next $1,000,000. 5% $1,500,000. Above	None Special
D Lake Millerton	State of Cal. Christensen	5/66	15 Yrs	$1,800 Minimum	7.5% of Gross	None Special
E Morrow Bay	State of Cal. H. Pludow	6/66	15 Yrs	$1,200/Yr	10% 1st $3,500. 13% Over $35,000.	$.015/Gal
F McClure Lake	Merced Irrig. District Usona Rec. Corp	1969	15 Yrs	None	4% of Gross	None Special
G McClure Lake	Merced Irrig. District Swickards Marina	1969	15 Yrs	None	4% of Gross	None Special
H McClure Lake	Merced Irrig. District E. B. Tuttle	1969	15 Yrs	None	4% of Gross	None Special
I McClure Lake	Merced Irrig. District McClure Point Marina	1/75	20 Yrs	None	4% of Gross	None Special

These leases involve property that is somewhat different than the typical marina situation in the Sacramento and San Joaquin River Delta in that:

1. They usually involve an entire marina site and not just a portion of the property.

2. Element of damage from tides, currents and floating debris is not as significant a problem as it is along rivers and sloughs.

3. There are very few "Mom and Pop" operations at these lake marinas as compared to marinas in the Sacramento and San Joaquin Delta.

Some adjustment to the rates indicated by the market data, therefore, must be made if they are to be applied to Sacramento and San Joaquin River marinas.

The small "Mom and Pop" marinas that generate limited gross sales should undoubtedly be separated from the large marinas that do a high volume of business. These small marinas should probably have a standard minimum rental depending on the amount of land involved and the facilities actually within the area of land under state ownership.

One method of establishing a fair rental for a small operation would be to estimate the average value per acre of land occupied by a marina based on the full cash value of the land established by the County Assessor's office and apply to this a rental rate of 8% (as indicated by current land leases). Only those parcels containing less than a half acre or where there are very limited facilities within state ownership would fall into this rental category. Under this approach a half acre of land under the jurisdiction of State Lands having a value of $15,000 per acre as indicated by the Assessor's records would yield a rental at 8% or $600 per year or $50 per month.

Larger marinas with extensive facilities occupying significant areas of state owned land should be assessed a

rental on the basis of the volume of retail sales at a rate of 3% for those facilities actually within the area owned by the state plus a one cent to one and one-half cent per gallon rate on petroleum sales.

This rate, however, should be adjusted downward to a 1½% to 2½% rental if there is a history of significant damage caused by floating debris, currents, tides, or filling of land by sand and mud.

Another method of handling damage problems would be to provide $1,000 annual damage deductible and damage amounts over the $1,000 would then be deducted from the rent to be paid the state. In this situation the only damages that could be deducted would be from floating debris, filling of the land with mud and silt etc. General wear and tear and damages caused by boats would not be covered nor would damage to facilities not on state land.

An example of this would be a case where a marina was generating $200,000 in gross annual revenue from improvements on state land which suffered damages to docking facilities amounting to $5,000 due to floating debris. Total annual rental would amount to $8,000. The cost of repair would be offset by the $1,000 deductible which would then yield a rent of:

Rental		
$200,000 Gross Sales @ $.04		$8,000.
Damage	$5,000.	
Less Deductable	1,000.	
Amount to Be Deducted		
From Rent		4,000.
Net Rental To State ..		$4,000.

Use of a percentage of gross sales as a means of securing a fair rental would tend to eliminate the following problems:

1. The problem of estimating the market value of the property on a periodic basis.

2. Areas that enjoy better location advantages because of proximity to good fishing areas or other recreational facilities would pay a higher rental since they would have more valuable marina property, while those marinas in inferior locations would pay a lesser rate reflecting the lower value of the marina property.

3. Changes in the characteristics of a marina site due to tides, current changes etc. would be reflected in reduced rentals if significant damages occurred to facilities. In a sense, this would also be reflected in the value of the site.

4. Small "Mom and Pop" type marinas would pay a standard fee that could be easily computed and would not require extensive staff time. Rentals from large marinas could be easily administered with the requirement that they submit a monthly operating statement prepared by an accounting firm indicating gross sales. Damages to facilities, of course, would have to be verified probably by inspection and securing written bids estimating cost of repair. This approach would eliminate the problem of estimating the value of the state owned land and its value contribution to the total marina property.

In those cases where it would not be possible to separate the income attributable to the state land, a fair market value appraisal could be made and a rate of 8% of appraised value applied as the fair rental value of the land. (The 8% rate is the rate of return currently being secured from land leases.)

The last approach (a rate of return applied to a fair market value appraisal) which is the typical method used to determine a fair rental rate would seem to be the most costly and difficult to administer because of the requirement

of periodic reappraisals and the problem of estimating the value contribution of the state owned land to the value of the whole marina.

While the percentage of gross sales approach to establishing a fair rent would also pose some problems, they do not appear to be as difficult as the other approach. The Parks and Recreation Department has had good success using this approach to establish a fair rental.

Under any circumstance, it would seem advisable to separate the small "Mom and Pop" marina operation from the large highly developed marinas for purposes of establishing a fair rent. Use of assessor information would seem to be the simplest and least costly means of determining a fair rent.

CORRELATION AND RECOMMENDATIONS

Investigation of current market data involving land leases reveals that there is numerous data available and that rates of return fall into a relatively narrow range. The current rate of return being secured on land leases is or near 8% predicated on the fair market value of the property. Because there is adequate market data available, it is recommended that land leases involving industrial or commercial property be based on a market value appraisal with an 8% rate of return being applied to establish the annual rent.

A study and analysis of the similarities and differences between the return on Aaa bonds and on land leases indicates that although the interest rate on bonds and the rate of return on land leases at present are generally similar, there is good deal of difference in the composition of the rates. For this reason and since there is adequate market data, it is recommended that bond interest rates not be used as criteria for establishing rental rates.

A review of data relating to marina leases by the State of California Department of Parks and Recreation and Merced Irrigation District suggests that consideration be given to establishing marina rentals based on gross sales. While this approach poses some problem with respect to Sacramento-San Joaquin River Delta marinas, it is quite possible this method can be applied to the large marina facilities. Annual rentals on small "Mom and Pop" marinas, however, are probably better established by utilizing county assessor full cash value estimates and applying to this a fair rate of return as indicated by analysis of land leases (other than marina leases). Some further study to determine how this procedure could be implemented is undoubtedly required, and it will probably be necessary to inspect each marina in the field to determine the best method of estimating a final fair rental.

If it is not feasible to apply a rental based on a percent of gross annual sales in the case of larger marinas or use of value information from county assessor offices for small marinas, the traditional method of estimating rental rates on leased lands can be applied (rate of return on appraised value). This approach to marina rentals, however, would seem to be the least equitable and desirable to the marina operators and State and incur the greatest cost. In some cases it is possible that the cost of establishing the lease rate would be greater than the rent received over the near term of the lease.

Rates of return should be reviewed on a two to four year basis. This could be done by contacting various public agencies as well as private companies to ascertain their opinions and approaches to estimating fair land rents. If it is obvious that significant market changes are taking place, a complete market survey of data should be conducted. Under any circumstance, it is recommended that leases provide a review of land rentals on a periodic basis

such as every five years with rents tied either to some governmental index, or in the case of highly valuable properties producing large incomes, a reappraisal of the land and a reanalysis of rates of return being secured. (This applies particularly to commercial and industrial property.) In the case of marinas, it is suggested that a corporative working relationship be developed with parks and recreation for the purpose of monitoring current marina rentals and establishing means of administering marina leases.

ADDENDA

Urban Property Division Professional Staff

Thomas W. Clark, Jr., is a Vice-President of Urban Property Research Company in the Sacramento office. He is involved in appraisals and market studies involving a wide variety of property including commercial, industrial, multi-family residential, and rural-recreation lands. Mr. Clark has been involved with real estate studies and valuation, since 1957.

Mr. Clark's most recent association prior to joining Urban Property Research Company was as Vice-President and Sacramento manager for another appraisal firm. He has also been employed by the State of California as a Senior Appraiser with the California Department of General Services and with the State Reclamation Board. Mr. Clark was Chief of the appraisal section for the Reclamation Board and was responsible for the appraisal of a number of major flood control projects including the lower San Joaquin Valley Flood Control Project which involved a major by-pass plan and the appraisal of numerous large land holdings. He was also responsible for valuation studies and the effects of partial takings on various other flood control projects. At the Department of General Services, Mr. Clark was in charge of urban appraisals for Northern California including the appraisal of property for the State Capitol Master Plan, office buildings in the San Francisco Civic Center area and appraisals of land surrounding San Jose State and Chico State Colleges. Mr. Clark also acted in the capacity of a review appraiser and expert valuation witness for both the Department of General Services and Reclamation Board.

Mr. Clark has appraised properties throughout the State of California and in the Seattle-Bellview area of Washington. He has been primarily active; however, in the Sacramento and San Joaquin Valleys, San Francisco Bay Area,

Lake Tahoe Basin, and the foothill area of the Sierra Nevada Mountains.

Mr. Clark is a graduate of Sacramento State College where he majored in Business Administration with a minor in Economics. He also did graduate work in the area of Economics at Sacramento State College.

Mr. Clark is an M.A.I. (member of the American Institute of Real Estate Appraisers) and a charter member of Chapter 27 of the American Right of Way Association. He has served on various committees for the American Institute of Real Estate Appraisers and has held various elective offices in Chapter 27 of the American Right of Way Association, including Vice-President, President, and National Director.

Mr. Clark has been chairman of a number of seminars involving valuation problems and has also served as a moderator and speaker.

Mr. Clark has qualified as expert valuation witness in federal court and in the superior court in the counties of Fresno, Stanislaus, San Joaquin, Sacramento, Sutter, Colusa, Butte, and Tehama.

LAND LEASE NO. 1

Lessor: City of Richmond: Port District

Lessee: Canal Industrial Park

Property Location: Canal Boulevard (adjacent to Union Oil Terminal), Richmond

Type of Property: Industrial

Size of Property: 8.2 Acres

Terms of Lease:

Date Negotiated

Lease Date: Start: 12-1-74 End: 11-30-79 No Years: 5

Options: On a 10 Year Renewal

Special Clauses: Contract rent to be adjusted annually by the average of the consumer and wholesale price index.

Valuation Basis: $410,000. (1.15/S.F.)

Contract Rent: $2,733/Month Net

Net Lease Rate: 8%

Remarks: Lessee is in import car business.

LAND LEASE NO. 2

Lessor: City of Richmond: Port District

Lessee: Dorward Terminal Company

Property Location: In Terminal #4, Point San Pablo Area, Richmond

Type of Property: Industrial

Size of Property: 6 Acres

Terms of Lease:

Date Negotiated 8/73

Lease Date: Start: 2/1/73 End: 1/31/93 No. Years: 20

Options: None

Special Clauses: Contract rent to be adjusted annually by consumer price index.

Valuation Basis: $365,000. ($1.40/S.F.)

Contract Rent: $30,000/Year Net

Net Lease Rate: 8.2%

Remarks: Lessee is in petro chemicals and vegetable oil business.

Lessee owns leasehold warehouse improvements.

LAND LEASE NO. 3

Lessor: City of Richmond: Port District

Lessee: Pacific Molassis Company

Property Location: In Terminal #4, Point San Pablo Area, Richmond

Type of Property: Industrial

Size of Property: 6 Acres

Terms of Lease:

Date Negotiated

Lease Date: Start: 2/1/73 End: 1/31/93 No. Years: 20

Options: None

Special Clauses: Contract rent to be adjusted annually by consumer price index.

Valuation Basis: $365,000.

Contract Rent: $30,000/Year

Net Lease Rate: 8.2%

Remarks: Lessee is in petro chemical business. Lessee owns leasehold warehouse improvements.

LAND LEASE NO. 4

Lessor: City of Hayward: Airport District

Lessee: Rinker Development Corporation

Property Location: Northwest Corner Hesperian Boulevard and Sneirro Street, Hayward

Type of Property: Commercial

Size of Property: 420,000 S.F. (9.64 Acres)

Terms of Lease:

Date Negotiated: Optioned April, 1974 (still pending)

Lease Date: Start: End: No. Years: 50

Options: None

Special Clauses: Contract rent on 10% of lessee rental receipts from tenants, whichever is greater. To be adjusted at 25, 35, and 45 years to 8% of then market value.

Valuation Basis: $735,000. ($1.75/S.F.)

Contract Rent: $58,800/Yr. (payable $4,900/Month Net)

Net Lease Rate: 8%

Remarks:

LAND LEASE NO. 5

Lessor: City of Hayward

Lessee: Richard Jeho, Wm. F. Kartazian, Stanley Sperling

Property Location: Southwest Corner, Hesperian Boulevard and Golf Course Road, Hayward

Type of Property: Commercial

Size of Property: 130,666 S.F.

Terms of Lease:

Date Negotiated

Lease Date: Start: 5/1/72 End: 5/1/2022 No. Years: 50 Yrs.

Options: None

Special Clauses: $1,800/Month Net to 12/31/97. Adjustment to rent 1/98, 1/08, 1/18 at ½% per month of agreed market value of property.

Valuation Basis: $360,000.

Contract Rent: $21,600/Yr.

Net Lease Rate: 6%

Remarks:

LAND LEASE NO. 6

Lessor: City of Hayward

Lessee: Air Plaza West Inc.

Property Location: Southwest Side of Hesperian Boulevard, 300 Feet Southeast of Skywest Drive, Hayward

Type of Property: Commercial

Size of Property: 52,320 S.F.

Terms of Lease:

Date Negotiated

Lease Date: Start: 8/1/70 End: 8/1/2020 No. Years: 20 Yrs.

Options: None

Special Clauses: Prepayment of lease allowed at 8% annual discount of lease payment

Valuation Basis: $104,640.

Contract Rent: $6,276/Yr Net
Net Lease Rate: 6%

Remarks:

LAND LEASE NO. 7

Lessor: State of California: Department of Transportation

Lessee: Mexican Imports, Inc.

Property Location: Between 1st and 2nd Streets, below Freeway 280 in San Jose

Type of Property: Commercial

Size of Property: 65,580 S.F.

Terms of Lease:
Date Negotiated 11/25/74 (pending)
Lease Date: Plan To Start: Mr. or End: Apr. 1975 No. Years: 25
Options: Five-5 Year Renewal Options
Special Clauses:
Valuation Basis: $131,000. ($2/S.F.)
Contract Rent: $850/Mo. Net ($10,200/Yr)
Net Lease Rate: 7.8%

Remarks: To be used for sale of food, beverage, curios and parking.

LAND LEASE NO. 8

Lessor: State of California: Department of Transportation

Lessee: Richard C. Summers

Property Location: Below Freeway 280, Between 10th and 11th Streets in San Jose

Type of Property: Commercial

Size of Property: 37,610 S.F.

Terms of Lease:
Date Negotiated 9/18/73
Lease Date: To Start: 10/1/75 End: 9/30/90 No. Years: 15
Options: Three-5 Year Renewal Options

Special Clauses:
Valuation Basis: $120,000. ($3.19/S.F.)
Contract Rent: $9,600/Yr; ($8/Mo Net)
Net Lease Rate: 8%

Remarks: Gas station and car wash under construction

LAND LEASE NO. 9

Lessor: State of California: Department of Transportation

Lessee: Mariner Square, A California Corporation

Property Location: North Side of Webster Street and Oakland Inner Harbor Estuary, Alameda

Type of Property: Industrial

Size of Property: 53,725 S.F.

Terms of Lease:
Date Negotiated 9/12/73
Lease Date: Start: 4/1/74 End: 3/31/70 No. Years: 5
Options: Three-5 Year Renewal Options
Special Clauses:
Valuation Basis $45,000. (.84/S.F.)
Contract Rent: $3,300/Yr Net ($275/Mo)
Net Lease Rate: 7.3%

Remarks: Serves as parking lot

LAND LEASE NO. 10

Lessor: State of California: Department of Transportation

Lessee: W.B. Brodovsky, A.C. Gravution, and R.A. Garhardt

Property Location: Below Freeway 580, Between Fruitvale and Flagg Streets, Oakland

Type of Property: Commercial (to be car wash and gas station)

Size of Property: 21,936 S.F.

Terms of Lease:
Date Negotiated 9/7/73

Lease Date: Start: 4/1/75 End: 3/31/85 No. Years: 10 Yrs.

Options: Five-5 year renewal options

Special Clauses: Contract rent or plus ½¢/gallon of sales over 100,000 gallons

Valuation Basis: $120,000. ($5.47/S.F.)

Contract Rent: $9,000/Yr Net ($750/Mo)

Net Lease Rate: 7.5%

Remarks: Rent to be adjusted: 4/1/85—$900/Mo
4/1/90—$950/Mo
4/1/2000—$1,000/Mo

LAND LEASE NO. 11

Lessor: State of California: Department of Transportation

Lessee: The Sisters of Providence in California

Property Location: Bounded by Sycamore, Northgate and 27th Streets, Oakland (Under Freeway)

Type of Property: Commercial (Serves as Parking Lot)

Size of Property: 91,000 S.F.

Terms of Lease:

Date Negotiated 11/19/74

Lease Date: Start: 2/1/75 End: 1/31/80 No. Years: 5 Years

Options: Three-5 Year Renewal Options

Special Clauses:

Valuation Basis: $115,950. ($1.27/S.F.)

Contract Rent: $9,240/Yr Net ($770/Mo Net)

Net Lease Rate: 8%

Remarks:

LAND LEASE NO. 12

Lessor: State of California: Department of Transportation

Lessee: The Shed

Property Location: Between 29th and 30th Streets and P and Q Streets, Sacramento

Type of Property: Commercial Land

Size of Property: 108,759 Square Feet

Terms of Lease:

Date Negotiated

Lease Date: Start: 3/29/74 End: 3/29/84 No. Years: 10

Options: Three-5 Year Options

Special Clauses: Rent to be adjusted annually according to Consumer Price Index.

Valuation Basis: $136,750.

Contract Rent: 1st Year—$250/Mo, 2nd and 3rd Years —$500/Mo, 4th Year—$750/Mo., 5 through 10 Years—$1,050/Mo

Net Lease Rate: 9% on last 5 year rental rate

Remarks: Lower rent during early years of lease to allow lessee to recover improvement costs.

LAND LEASE NO. 13

Lessor: City and County of San Francisco: S.F. Port Commission

Lessee: George L. Burger

Property Location: Seawall Lot 322, Area Bounded by Vallejo Green, Front and Davis Streets, San Francisco

Type of Property: Commercial

Size of Property: 70,381 S.F. usable area plus 5,103 S.F. of land in the proposed Maritime Park Project

Terms of Lease:

Date Negotiated

Lease Date: Start: 3/1/74 End: 2/28/2040 No. Years: 66 Yrs

Options: None

Special Clauses: Rental adjustment of (1%/Yr of $14.90/S.F. value) or (ratio percent of contract rent actually received by Port to rent received by lessee

from tenants to gross receipts of lessee) whichever is greater.

Valuation Basis: $1,125,000. ($14.90/S.F.)

Contract Rent: $7,245,Mo Net

Net Lease Rate: 8% of 70, 381 S.F. usable land and 4% of 5,103 S.F. portion burdened by proposed park

Remarks:

LAND LEASE NO. 14

Lessor: City and County of San Francisco; S.F. Port Commission

Lessee: Francisco Bay Office Park

Property Location: Seawall Lots 315, 316 and 317

Type of Property:

Size of Property: 153,357 S.F. (118,478 S.F. usable and 34,879 S.F. in the proposed Maritime Parkway)

Terms of Lease:

Date Negotiated

Lease Date: Start: 6/28/74 End: 6/27/2040

No. Years: 66

Options: None

Special Clauses: Rental adjustments: adjusted each 5 yrs. for 1st 25 yrs by 5% of minimum rental or 6.987% of gross rents received by lessee from tenants, whichever is greater. On the 25th, 35th, 45th, 55th, and 65th year, rental will be 9% of the then appraised value.

Valuation Basis: $1,777,000. ($15/S.F.) for usable area $105,000. ($3/S.F.) for Parkway Land

Contract Rent: See Below

Net Lease Rate: 9.2%

Remarks: Contract Rent is

$1.35/S.F. × 118,478 S.F. usable	$159,945.30
plus $ .24/S.F. × 34,897 S.F. Park Land	$ 8,370.96
Total	$168,316.26 Per Year

LAND LEASE NO. 15

Lessor: San Francisco Port Commission

Lessee: Gerson Bakar

Property Location: Seawall Lot No. 313 (Bounded by Grant St., North Point St., and the Embarcadero

Type of Property: Commercial

Size of Property: 47,277 S.F.

Terms of Lease:

Date Negotiated

Lease Date: Start: 11/14/72 End: 11/13/2038

No. Years: 66

Options: None

Special Clauses: Rental adjustment each 5 years for 1st 25 yrs. to be 5% of original rental or 7.58% of gross rental receipts of developer, whichever is greater. Thereafter the lease will be reviewed at 10 year intervals and adjusted to the then prevailing rate of return on land leases.

Valuation Basis: $14.90/S.F.
$704,500.

Contract Rent: $4,700/Mo Net

Net Lease Rate: 8%

Remarks:

LAND LEASE NO. 16

Lessor: City of Oakland: The Port District

Lessee: United Parcel Service

Property Location: East Side of Parde Drive, North of Hegenberger Rd., Oakland

Type of Property: Industrial Land (Lessee now constructing 180,000 S.F. truck terminal) to be No. Calif. Distribution Center

Size of Property: 25 Acres

Terms of Lease:

Date Negotiated 12/72

Lease Date: Start: 6/1/73 End: 5/31/2039
No. Years: 66
Options: No
Special Clauses: Rental adjustments: See remarks
Valuation Basis: $1,625,000. ($65,000/Acre)
Contract Rent: $10,000/Mo Net (1st 10 Yrs)
Net Lease Rate: 7.4%

Remarks: 10 year rental adjustments to bring contract rent to 8% of then determined fair market value, with the following minimums and maximums.

Period	Minimum	Maximum
11-20 Yrs.	$11,667.	$13,233.
21-30 Yrs.	15,000.	16,667.
31-40 Yrs.	18,333.	20,000.

41 on—no minimum or maximum, 8% of F.M.V.

LAND LEASE NO. 17

Lessor: City of Oakland: Port District
Lessee: David G. Robins
Property Location: S.E. ½ of block bounded by Jefferson St., Clay St., 1st St., and 2nd St., Oakland
Type of Property: Commercial land (constructing facility for Cost Plus Imports)
Size of Property: 30,000 S.F.
Terms of Lease:
Date Negotiated 12/74
Lease Date: Start: Completion of Const. 8/75 End: 2000
No. Years: 25
Options: Two 10-Year Options
Special Clauses: Contract rent adjusted every 3 yrs—by S.F. and Oakland Consumer Price Index
Valuation Basis: $120,000 ($4/S.F.)
Contract Rent: $8/Mo Net (Base)*

*Initial contract rent is to be adjusted upward by 8% of City's costs to make this deal. (R.E. Commission, attorneys fees, etc.)

Lessor: Has 1st right of refusal on purchase of leasehold interest

Net Lease Rate: 8%

Remarks: The lessee (developer) owns the other ½ of the block

LAND LEASE NO. 18

Lessor: City of Oakland: Port District

Lessee: Continental Restaurant Systems, a Subsidiary of Ralston Purina

Property Location: 1211 Embarcadero, Oakland

Type of Property: Commercial land (Barclay Jack's Restaurant has since been constructed.)

Size of Property: 53,685 S.F. (1.23 Acre)

Terms of Lease:

Date Negotiated 4/73 (rent to start upon completion of construction)

Lease Date: Start: 5/24/74 End: 9/30/88

No. Years: 15

Rent Started upon completion of const. 5/24/74

Options: Two 5-Year Options

Special Clauses: Rental payments to be adjusted every 5 years. To be based upon the market value and prevailing rate of return then in effect.

Valuation Basis: $147,500 ($2.75/S.F.)

Contract Rent: $1,000/Mo Net

Net Lease Rate: 8.1%

Remarks: Percentage rent clause: 3½% of gross sales as it exceeds $1,000/Month contract rent. Gross sales are now approaching $1,000,000/Year.

LAND LEASE NO. 19

Lessor: City of Oakland: Port District

Lessee: Oakland Village Corporation: Subsidiary of Specialty Restaurants Corporation

Property Location: Foot of Alice Street, Oakland

Type of Property: Commercial Land

Size of Property: 101,910 S.F. (2.34 Acres)

Terms of Lease:

Date Negotiated

Lease Date: Start: 8/16/72 End: 8/15/2007

No. Years: 35

Options: Two-10 Year Options

Special Clauses: Rental adjustments are to be made at 5 year intervals: to be based upon the then market value and the then prevailing rate of return, not to be less than 8%

Valuation Basis: \$460,000. (\$.50/S.F.)

Contract Rent: \$3,057/Month Net

Net Lease Rate: 8%

Remarks: Development will have two restaurants and 40 specialty shops (under construction) Percentage rental to be paid as it exceeds the contract

rent: 3% of gross sales from food and beverage; 15% of all sublease rentals or specialty shops.

LAND LEASE NO. 20

Lessor: San Diego Unified Port District

Lessee: Dixieline Lumber Company

Property Location: 32nd Street and Tidelands, National City

Type of Property: Industrial

Size of Property: 206,398 S.F.

Terms of Lease:

Date Negotiated

Lease Date: Start: 8/1/74 End: 8/1/75

No. Years: 1 Yr

Options: None

Special Clauses:

Valuation Basis: \$288,957.

Contract Rent: \$22,704/Yr Net

Net Lease Rate: 7.9%

Remarks:

LAND LEASE NO. 21

Lessor: San Diego Unified Port District

Lessee: Elliott W. Pohl D.B.A. San Diego Marine Exchange

Property Location: Shelter Island

Type of Property: Commercial

Size of Property: 20,255 Sq. Ft. Land,
8,758 Sq. Ft. Water

Terms of Lease:

Date Negotiated

Lease Date: Start: 12/1/74 End: 12/1/75
No. Years: 1

Options: None

Special Clauses:

Valuation Basis: $206,929.

Contract Rent: $16,560/Yr Net

Net Lease Rate: 8%

Remarks:

LAND LEASE NO. 22

Lessor: San Diego Unified Port District

Lessee: National Steel and Ship Building Co.

Property Location: Belt and Schley Streets, San Diego

Type of Property: Industrial

Size of Property: 559,875 S.F. Land
213,680 S.F. Water

Terms of Lease:

Date Negotiated

Lease Date: Start: 5/1/74 End: 5/1/79 No. Years: 5

Options: None

Special Clauses: Cost of living adjustment to rent every 2½ years. Every 5 years lease renegotiated at prevailing rates.

Valuation Basis: $971,787.

Contract Rent: $76,142/Yr
Net Lease Rate: 8%
Remarks:

LAND LEASE NO. 23

Lessor: City of L.A.; Harbor District
Lessee: General America Transportation Corp.
Property Location: Outer Harbor Boulevard, San Pedro
Type of Property: Industrial-Storage
Size of Property: 226,667 S.F.
Terms of Lease:
Date Negotiated
Lease Date: Start: 1/74 End: 1/79 No. Years: 5 Yrs.
Options: None
Special Clauses:
Valuation Basis: $453,334. ($2/S.F.)
Contract Rent: $36,267/Annual
Net Lease Rate: 8%
Remarks:

LAND LEASE NO. 24

Lessor: City of L.A.: Harbor District
Lessee: Proctor and Gamble Manufacturing Co.
Property Location: Between old and new Dock Street on Terminal Island, L.A.
Type of Property: Industrial
Size of Property: 192,709 Sq.Ft.
Terms of Lease:
Date Negotiated: 7/74
Lease Date: Start: 10/74 End: 10/79 No. Years: 5
Options: None
Special Clauses:
Valuation Basis: $433,595. ($2.25/S.F.)
Contract Rent: $34,688/Yr
Net Lease Rate: 8%
Remarks:

LAND LEASE NO. 25

Lessor: City of San Diego

Lessee: James R. Simpson

Property Location: Sports Arena Boulevard at Hancock, San Diego

Type of Property: Commercial-Motel, Restaurant, Housing

Size of Property: 11.97 Acres

Terms of Lease:

Date Negotiated 1972

Lease Date: Start: 1975 End: No. Years: 55

Options: None

Special Clauses:

Valuation Basis: $1,090,000. ($2.09±/S.F.) vs 2% Food & Bev. 5% Bar 7% Retail Sale 1% Rest over $1,000,000. 3% of Package

Remarks: Lease to start at end of construction. Percentage vs. Minimum Rent

LAND LEASE NO. 26

Lessor: San Diego Unified Port District

Lessee: Elliott W. Pohl, D.B.A. San Diego Marine Exchange

Property Location: Shelter Island

Type of Property: Commercial

Size of Property: 20,255 S.F. Land 8,758 S.F. Water

Terms of Lease:

Date Negotiated

Lease Date: Start: 12/1/74 End: 12/1/75 No. Years: 1 Yr

Options: None

Special Clauses:

Valuation Basis: $206,929.

Contract Rent: $16,560/Yr Net

Net Lease Rate: 8%

Remarks:

LAND LEASE NO. 27

Lessor: State of California: Department of Transportation

Lessee: City of Oakland

Property Location: Land bounded by 5th and 6th Streets, Washington and Jefferson Streets, Oakland

Type of Property: Commercial

Size of Property: 108,832 S.F.

Terms of Lease:

Date Negotiated

Lease Date: Start: 10/1/74 End: 9/30/79 No. Years: 5

Options: Two-5 Year renewal options to be based upon a mutually agreed upon value and rate at that time

Special Clauses:

Valuation Basis: $440,000. ($4.04/S.F.)

Contract Rent: $2,850/Mo Net

Net Lease Rate: 7.8%

Remarks: Being used as a city parking lot

LAND LEASE NO. 28

Lessor: Southern Pacific Transportation Co.

Lessee: Pacific Gas and Electric Co.

Property Location: Southern Pacific Railroad right-of-way between Concord and Pittsburg.

Type of Property: Railroad right-of-way

Size of Property:

Terms of Lease:

Date Negotiated

Lease Date: Start: 9/74 End: 9/99 No. Years: 25

Options: None

Special Clauses:

Valuation Basis: $833,333.

Contract Rent: $100,000/Yr. Gross

Net Lease Rate: 12% Gross 9% Net

Remarks: Southern Pacific must pay taxes estimated at 3% of gross rate. This is lease of a pipeline right-of-way.

LAND LEASE NO. 29

Lessor: Western Pacific Railroad

Lessee: Standard Oil Co.

Property Location: Western Pacific Railroad right-of-way between Montazuma to West Sacramento

Type of Property: Railroad right-of-way

Size of Property: ....

Terms of Lease:

Date Negotiated

Lease Date: Start: 1/75 End: 1/95 No. Years: 20

Options:

Special Clauses:

Valuation Basis: Value based on State Board of Equalization Appraisal

Contract Rent:

Net Lease Rate: 12% Gross 9% Net

Remarks: Western Pacific must pay taxes estimated at 3% of gross rate. This is a lease of a pipe line right-of-way.

LAND LEASE NO. A

Lessor: State of California, Parks and Recreation

Lessee: N. Christensen

Property Location: Folsom Lake

Type of Property: Marina

Size of Property: ....

Terms of Lease:

Date Negotiated

Lease Date: Start: 3/5/70 End: 3/5/90 No. Years: 20 Yrs.

Options: None

Rental Rate: \$150, no minimum rental or 2% of gross sales up to \$100,000 and 4% of gross sales over \$100,000 plus 1¢ per gal on petroleum sales.

Remarks:

LAND LEASE NO. B

Lessor: State of California: Parks and Recreation

Lessee: Lake Elsinore Recreation Area, Inc.

Property Location: Lake Elsinore

Type of Property: Marina and Campground

Size of Property: ......

Terms of Lease:

Date Negotiated

Lease Date: Start: 6/30/70 End: 6/30/95

No. Years: 25

Options: None

Rental Rate: 1% of 1st $100,000 gross sales. 2% 2nd $100,000 gross sales. 4% over $200,000 gross sales plus 1¢ per gallon on petroleum sales.

Remarks:

LAND LEASE NO. C

Lessor: State of California: Parks and Recreation

Lessee: So. California Financial Corp.

Property Location: Lake Oroville

Type of Property: Marina

Size of Property: ......

Terms of Lease:

Date Negotiated

Lease Date: Start: 12/1/69 End: 12/1/2009

No. Years: 40

Options: None

Rental Rate: 3% of first $500,000 gross sales. 4% of gros sales $500,000 to $1,500,000. 5% of gross sales over $1,500,000

Remarks;

LAND LEASE NO. D

Lessor: State of California: Parks and Recreation

Lessee: N. Christensen

Property Location: Millerton Lake

Type of Property: Marina

Size of Property:

Terms of Lease:

Date Negotiated

Lease Date: Start: 5/8/66 End: 5/8/81 No. Years: 15

Options: None

Rental Rate: $150/Mo Minimum of 2% of 1st $100,000 of gross sales. 4% of gross sales over $100,000 and 1¢ per gallon on petroleum sales.

Remarks:

LAND LEASE NO. E

Lessor: State of California: Parks and Recreation

Lessee: H. Pludow

Property Location: Morrow Bay

Type of Property: Marina

Size of Property: ——

Terms of Lease:

Date Negotiated

Lease Date: Start: 6/30/66 End: 6/30/81

No. Years: 15

Options: None

Rental Rate: $1,200/Year. 10% of 1st $35,000 gross sales. 13% over $35,000 gross sales plus 1½¢ per gal on petroleum sales.

Remarks:

LAND LEASE NO. F

Lessor: Merced Irrigation District

Lessee: Usona Recreation Corp.

Property Location: Barrett Cove, Lake McClure

Type of Property: Marina

Size of Property: ——

Terms of Lease:

Date Negotiated

Lease Date: Start: 1969 End: 1984 No. Years: 15

Options: None

Rental Rate: Rent amounts to 4% of gross sales with no minimum. Estimated gross sales are under $100,000.

Remarks:

LAND LEASE NO. G

Lessor: Merced Irrigation District

Lessee: Swickards Marina

Property Location: Barrett Cove, Lake McClure

Type of Property: Marina

Size of Property: 20± Acres

Terms of Lease:

Date Negotiated

Lease Date: Start: 1969 End: 1984 No. Years: 15

Options: None

Rental Rate: Rent is 4% of gross sales with no minimum. Estimated gross sales amount to approximately $100,000/Yr

Remarks:

LAND LEASE NO. H

Lessor: Merced Irrigation District

Lessee: Ed Tuttle

Property Location: Horseshoe Bend, Lake McClure

Type of Property: Marina

Size of Property: ....

Terms of Lease:

Date Negotiated

Lease Date: Start: 1969 End: 1984 No. Years: 15

Options: None

Rental Rate: Rent is 4% of gross sales with no minimum. Estimated gross sales amount to less than $100,000 annually.

Remarks:

LAND LEASE NO. I

Lessor: Merced Irrigation District

Lessee: McClure Point Marina

Property Location: McClure Point, Lake McClure

Type of Property: Marina

Size of Property:

Terms of Lease:

Date Negotiated

Lease Date: Start: 1/75 End: 1/95 No. Years: 20

Options: None

Rental Rate: Rent is 4% of gross sales with no minimum. Estimated gross sales amount to less than $100,000 per year.

Remarks:

STATE LANDS COMMISSION MEMORANDUM DATED AUGUST 1, 1975

To: Jim Fiack

From: State Lands Division

Subject: Throughput Charges

In accordance with our discussion on July 31, 1975, there are enclosed copies of certain documents which may be helpful in your analysis of throughput charges.

Your attention is specifically called to the Texaco documents filed in support of their claim for royalty oil transportation allowance under leases PRC 2206.1 and PRC 2725.1. The itemized schedule includes a charge for an onshore pipeline right-of-way at a rate of 2% of the State's royalty, which is indirectly a throughput charge since the State's royalty is based on lease production. The surface lease document (transmitted with Texaco's letter dated Jan. 29, 1964) would, presumably, justify this charge; however, as indicated in Texaco's letter they have at the request of the Hollister Estate Company deleted the monetary provisions of the lease. Such terms may identify more specific reference to throughput charges.

Also, please note that all of the documents included herein have been submitted with a request that they be treated in a personal and confidential manner.

If you have any questions regarding this matter, please give me a call.

/s/ A. D. WILLARD
Supervising Mineral
Resources Engineer

[Enclosures omitted in printing: three cost sheets and Texaco letter of Jan. 29, 1964]

COST OF TRANSPORTING OIL FROM PLATFORM "HELEN" TO OPERATIONS BASE STATE LEASE PRC 2206.1 (ANITA), SANTA BARBARA COUNTY, CALIFORNIA (ENCLOSED WITH MEMORANDUM OF AUGUST 1, 1975)

Cost of Constructing Oil Pipeline	
13,000′—6″ marine plus 18,730′—2½″ onshore	$218,700
Operating Costs	
Total Anita Operating Costs—Schedule I—$655,100	
Allocated to Oil Transportation—10% of 655,100	65,500
Maintenance & Repairs	
$1,900 per yr × 8 yrs = ...	15,200
Pipeline Easement Rental	
Total Rental = 2% of State's Royalty	
= 550,000 Bbls × 2.70 × 1/6 × 0.02 = $5,000	
70% to Pipeline Easement = .70 × 5,000 = ...	3,500
(30% to Operating Base Rental)	
Taxes	
460 per year × 8 yrs = ...	3,700
Total	$306,000

Cost/Bbl = $306,600 ÷ 550,000 = 55.7¢/Bbl
Estimated Ultimate Recovery = 550,000 Bbls
Estimated Life = 8 years

LEW:DN
8/17/65

COST OF TRANSPORTING OIL FROM PLATFORM "HERMAN" TO OPERATING BASE STATE LEASE PRC 2725.1 (JADE), SANTA BARBARA COUNTY, CALIFORNIA (ENCLOSED WITH MEMORANDUM OF AUGUST 1, 1975)

Cost of Constructing Oil Line	
62,490 ft of 6" Pipeline	$487,100
Operating Costs	
Total Jade Operating Costs—Schedule I—$754,800	
Allocated to Oil Transportation—20% of $754,800	151,100
Maintenance & Repairs	
$2,500 per year × 6 years	15,000
Pipeline Easement Rental	
Total Rental = 2% of State's Royalty	
= 7,725,329 Bbls × $3.00 × .3925 × .02	
= $182,000	
70% to Pipeline Easement = .70 × $182,000	127,400
(30% to Operating Base)	
Taxes	
$1,020 per year × 6 years	6,100
	$786,600

Cost/Bbl = $786,600 ÷ 7,725,329 = 10.2¢/Bbl
Estimated Ultimate Recovery = 7,725,329 Bbls
Estimated Life = 6 years

LEW: DN
8/17/65

LEASE AND MODIFICATION OF LEASE BETWEEN HOLLISTER ESTATE COMPANY AND TEXACO, INC. (ENCLOSED WITH MEMORANDUM OF AUGUST 1, 1975)

Personal & Confidential
Surface Lease

THIS AGREEMENT, dated as of the 1st day of June, 1960, by and between HOLLISTER ESTATE COMPANY, a corporation, hereinafter called "Lessor," and TEXACO Inc., a Delaware corporation, MONTEREY OIL COMPANY, a Delaware corporation, and NEWMONT OIL COMPANY, also a Delaware corporation, hereinafter called "Lessee",

WITNESSETH:

WHEREAS, Lessor is the owner of certain lands adjacent to the Pacific Ocean; located in Santa Barbara County, California, more particularly described in Exhibit "A" attached hereto and made a part hereof, which said lands are hereinafter referred to as the "Hollister Estate Lands;" and

WHEREAS, Lessee is the holder of an oil and gas lease from the State of California dated July 25, 1958, and designated as PRC 2206.1 which covers tide and submerged lands adjacent to said Hollister Estate Lands within the area described in Exhibit "B" attached hereto and made a part hereof, which said area is hereinafter referred to as "Tidelands Area;" and

WHEREAS, Lessee may acquire additional oil and gas leases covering tide and submerged lands within the Tidelands Area;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) paid by Lessee to Lessor, the receipt of which is hereby acknowledged, and of the covenants hereinafter contained by Lessee to be kept and performed

and subject to the limitations, conditions and provisions hereinafter contained, Lessors do hereby lease unto Lessee as an oil and gas production, treating, storage and transportation center the surface of that certain portion of the Hollister Estate Lands more particularly described in Exhibit "C" attached hereto and made a part hereof, which said lands so leased are hereinafter referred to as the "Operating Base," EXCEPT, HOWEVER, that nothing herein contained shall extend to Lessee any right, title or interest in and to any oil, gas or hydrocarbons or minerals in or under the Hollister Estate Lands nor shall Lessee have any right to drill any oil or gas wells upon the Hollister Estate Lands, whether the same shall be bottomed under the Tidelands Area or otherwise or any rights other than those specifically given herein. Lessor reserves the right to develop or to lease to others the subsurface of the Operating Base for the development of oil and gas and other minerals, together with the right to drill or tunnel under and through such subsurface, subject to the rights of Lessee hereunder, but it shall not permit any entry upon or use of the surface of the Operating Base for such purposes without obtaining the prior written consent of Lessee which such consent shall not be unreasonably withheld or delayed.

THERE IS ALSO GRANTED to Lessee hereby those certain easements and rights of way provided for in paragraphs 2, 3 and 4 hereof onto, over, upon and across, and ingress and egress to and from the Hollister Estate Lands as shall from time to time during the term hereof be necessary or convenient in the use of the Operating Base as an oil and gas production, treating, storage and transportation center.

TO HAVE AND TO HOLD the Operating Base as an oil and gas production, treating, storage and transportation center and the said easements and rights of way for the term of ten (10) years from and after the date hereof and so long thereafter as Lessee, or a Separate Lessee, as de-

fined in paragraph 16 hereof, who shall have exercised the option contained therein, shall hold an oil and gas lease covering tide and submerged lands within the Tidelands Area.

In consideration of the premises, the parties hereto respectively covenant and agree:

1. For the rights granted to it hereby Lessee shall pay to Lessor a sum of money [Omitted in original. See paragraph 3 of Modification of Surface Lease, *infra.*] Lessor agrees to examine promptly each and all statements and remittances forwarded by Lessee to it hereunder and promptly advise Lessee of any objection thereto.

2. To the extent of Lessor's right to grant the same, Lessee shall have the non-exclusive right to use any road or rights of way now existing through the Hollister Estate Lands to and from the Tidelands Area, together with the right to straighten, resurface, reconstruct, regrade, and change any now existing road or roads, provided Lessee shall first obtain all requisite and necessary consents or permits from persons other than Lessor which may own rights in and to said existing roads and/or rights of way. Lessee shall also have the right to construct additional roads over and across the Hollister Estate lands, including a bridge or bridges for the purpose of passage over, upon, and across the Hollister Estate lands, which said right shall, however, be non-exclusive. Said right shall not be exercised until Lessee shall have obtained the prior written approval of Lessor as to the route, location and type of construction, which such approval shall not be unreasonably withheld or delayed. Lessor shall consent to the construction by Lessee of such additional roads which shall be necessary or convenient in the construction, operation and maintenance of the easements which Lessee shall select in the manner provided in paragraph 3 hereof. All roads now on said Hollister Estate Lands which are used by Lessee, or which are subsequently constructed on said

Hollister Estate Lands by Lessee, shall be maintained at all times by Lessee in good order and repair, and all roads used by Lessee shall be kept oiled by Lessee, and Lessee shall repair and maintain in good condition all bridges used by it on the Hollister Estate Lands. The maintenance of roads required of Lessee hereunder shall include the laying of dust. All new roads constructed by Lessee shall be constructed in a good and workmanlike manner with culverts where necessary, and shall have proper drainage thereof to natural sources of drainage, all thereof to the end and intent that as little erosion as is consistently possible shall result therefrom. No vehicle shall be operated by Lessee on any roads on the demised premises or upon any lands of Lessor at a speed greater than twenty(20) miles per hour.

3. To the extent of Lessor's right to grant the same, Lessee shall have the right to use with Lessors and others the existing easements and rights of way for pipelines, power, telephone and telegraph lines on the Hollister Estate Lands, provided Lessee shall first obtain all requisite and necessary consents or permits from persons other than Lessor who own rights in and to said easements and rights of way.

Lessor also grants to Lessee a primary easement 50 feet wide from the Easterly boundary of the Hollister Estate Lands to the Westerly boundary thereof together with supplemental easements each 200 feet wide upon the portion of the Hollister Estate Lands where the same is contiguous with the Tidelands Area, and extending Southerly from the Southerly boundary of such primary easement to the Tidelands Area for the construction, extension, renewal, replacement, removal, operation and maintenance of pipelines, power, telephone and telegraph lines, none of which said supplemental easements shall be selected at a location closer than two (2) miles from any other of said supplemental easements so selected. * * *

All pipelines, power, telegraph and telephone lines shall be located so as to not unduly interfere with the present use of the Hollister Estate Lands. Through the cultivated or tillable portions of the Hollister Estate Lands all pipelines shall be located below plow depth, which shall be not less than eighteen (18) inches. * * * Said pipelines may be used to transport, to and from the Operating Base, gas produced by parties other than Lessee whether the same shall be produced from tide and submerged lands or otherwise. No pipelines laid pursuant to this lease may be used to transport oil produced from leases held by parties other than Lessee. Such pipelines, power, telephone and telegraph lines may be constructed and maintained either by Lessee or by the company supplying the particular service connected therewith or therefrom. Lessee shall also have the right to erect, use, and maintain upon the said easements so selected by Lessee upon the Hollister Estate Lands, such compressor plants or pipeline pump stations as may be necessary or convenient in the operation of pipelines installed and maintained by Lessee upon or across said Hollister Estate Lands. No such compressor plant or pipeline pump station shall occupy an area in excess of one-quarter (¼) of an acre. No such compressor plant or pipeline pump station shall be located within 500 feet of any building now located upon said Hollister Estate Lands which is presently being used for Lessors' ranching operations. Should Lessors present or future use of said Hollister Estate Lands require or make desirable the beautification of such compressor plants or pipeline stations, Lessee agrees to take such steps as Lessor shall reasonably request of Lessee in writing toward the beautification thereof so as to make the appearance of the same compatible with the present or future use of said Hollister Estate Lands and Lessee shall complete the same within a reasonable time after receipt of such request.

4. To the extent of Lessor's right to grant the same, Lessee shall have the right to construct such pipelines, ap-

proach roads, boat landings, causeways and piers to, on and across the Hollister Estate Lands as may be necessary or convenient in the operation and maintenance of any tidelands lease operated by Lessee within the Tidelands Area. Except for the Operating Base portion thereof (i) such pipelines, approach roads, boat landings, causeways and piers shall be limited to the supplemental 200 foot easements selected by Lessee in the manner provided in paragraph 3 hereof and (ii) Lessee shall be limited in the construction of such boat landings, causeways and piers to a total of three (3) thereof and shall not construct any boat landing, causeway or pier within two miles of any other boat landing, causeway or pier constructed by Lessee. Lessee shall also have the right to provide reasonable parking facilities within the said supplemental 200 foot easement adjacent to which it shall construct such boat landings, causeways and piers.

5. To the extent of Lessor's right to grant the same, Lessee shall have the right to construct and maintain such railroad spurs and sidings and heliports upon the Operating Base as may be necessary or convenient to it in its operations thereon or hereunder.

* * *

7. The rights contained in Paragraphs 2, 3, 4, 5 and 6 hereof shall include the right to transport such materials, supplies, personnel, water, waste water and any other product or thing necessary or convenient in connection with Lessee's operations within the Tideland Area to and from any offshore pier, island or other structure erected, maintained or used by Lessee on any tidelands lease held by it within the Tideland Area onto, over, upon and across the easements and rights of way herein given over the Hollister Estate Lands. Nothing contained in this lease shall limit the right of Lessee to use any gasoline plants and facilities for the recycling, repressuring, dehydrating and treating of substances which Lessee may construct upon the Operating

Base for the processing and treating of gas, whether or not produced from leases within the Tidelands Area and whether or not such gas shall be produced by Lessee. If any of the fences existing on said Hollister Estate Lands are cut by Lessee for its purpose, Lessee shall establish a good and substantial gate at such point, or in lieu thereof, adequate cattle guards. Lessee shall fence all sump holes and other openings to safeguard cattle which may be grazing on said land. It is expressly understood and agreed that there shall be no hunting, fishing, hiking or use of firearms on the demised premises by persons representing or employed by Lessee.

8. Lessee shall have the right at any time during the term of this lease to remove and, within [omitted in original] after the expiration or termination thereof, shall remove from the Hollister Estate Lands any machinery, rigs, piping, casing and other property and improvements belonging to or furnished by Lessee, including that affixed to the land; providing however, that in the event such removal shall not be completed prior to the expiration or termination of this lease Lessee shall pay to Lessor at the rate [omitted in original] period used to complete such removal. Lessee, after expiration or termination of this lease, shall fill all excavations made by it on the Hollister Estate Lands and in other respects restore said lands as nearly to its original condition as is reasonably practicable, but Lessee shall not be obligated to restore anything for which it may theretofore have made payment by way of damages.

* * *

10. Lessee, at its own cost and expense, shall pay for all labor performed and materials furnished in the operations of Lessee hereunder and Lessors shall not be chargeable with, or liable for, any part thereof. Lessee shall protect the Hollister Estate Lands from liens of every character arising from its operations. Lessor may post and

keep posted on the Hollister Estate Lands notices to protect the same from liens.

Lessee covenants and agrees to hold harmless the Lessor from any claims against said property which may attach as a lien thereon by reason of any claims, demands, or obligations which Lessee should pay. Lessee shall save harmless the Lessor and the premises at all times from any and all claims for damages of every kind or nature sustained by any persons whatsoever arising out of its operations under this lease.

* * *

20. Notwithstanding any other provision of this Surface Lease, it is expressly understood and agreed by Lessee and Lessor, that any and all interests granted or given by Lessor to Lessee over any portion of Lessor's property outside the Operating Base and some of which are sometimes referred to herein as easements, rights of way, primary easements, supplemental easements, or otherwise, and all similar interests, are intended to be, and are, nonexclusive, nonpossessory rights or interests only, and that Lessor reserves its full possessory interests including the right to use and occupy said lands subject to such nonexclusive, nonpossessory rights or interests so given or granted to Lessee hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, in quadruplicate, as of the day and year first above written.

[Subscriptions and property descriptions omitted in printing]

MODIFICATION OF SURFACE LEASE

THIS AGREEMENT, made and entered into this 22nd day of September, 1967, by and between HOLLISTER COMPANY, a joint venture, composed of D-G-J Investment Co., a general partnership, and HARWEN COMPANY, a limited partnership, hereinafter called "First Party", and TEXACO Inc., a Delaware corporation, hereinafter called "Second Party",

WITNESSETH:

WHEREAS, under date of June 1, 1960, a surface lease, hereinafter referred to as "Surface Lease", was made and entered into by and between Hollister Estate Company, as Lessor, and Second Party, Monterey Oil Company, a Delaware corporation, and Newmont Oil Company, also a Delaware corporation, as Lessee, a memorandum of which said Surface Lease, entitled and hereinafter referred to as "Memorandum of Surface Lease", was recorded June 14, 1960, in Book 1753, at Page 263, of Official Records of Santa Barbara County, California; and

• • •

WHEREAS, Second Party now owns and is possessed of the entire right, title and interest of Lessee in and to said Surface Lease; and

• • •

WHEREAS, First Party now owns and is possessed of the entire right, title and interest of Lessor, in and to said Surface Lease; and

WHEREAS, it is the desire of the parties hereto to further amend said Surface Lease in certain particulars;

NOW, THEREFORE, for good and valuable consideration the receipt of which is hereby acknowledged, the parties hereto do mutually agree as follows, to-wit:

1. The second and third "WHEREAS" clauses on page 1 of said Surface Lease which read as follows:

> "WHEREAS, Lessee is the holder of and oil and gas lease from the State of California dated July 25, 1958, and designated as PRC 2206.1 which covers tide and submerged lands adjacent to said Hollister Estate Lands within the area described in Exhibit "B" attached hereto and made a part hereof, which said area is hereinafter referred to as "Tidelands Area" or "Tideland Area"; and"

> "WHEREAS, Lessee may acquire additional oil and gas leases covering tide and submerged lands within the Tidelands Area;"

shall be and the same are hereby deleted from said lease.

2. The second paragraph on page 2 of said lease which reads as follows:

> "TO HAVE AND TO HOLD the Operating Base as an oil and gas production, treating, storage and transportation center and the said easements and rights of way for the term of ten (10) years from and after the date hereof and so long thereafter as Lessee, or a Separate Lessee, as defined in paragraph 16 hereof, who shall have exercised the option contained therein, shall hold an oil and gas lease covering tide and submerged lands within the Tidelands Area."

shall be and the same is hereby modified to read as follows:

> "TO HAVE AND TO HOLD the Operating Base as an oil and gas production, treating, storage and transportation center and the said easements and rights of way for the term of forty (40) years from and after the date hereof and so long thereafter as Lessee, its successors or assigns, shall use said lands as an oil and gas production, treating, storage and transportation center, to effect the production of oil, gas and other hydrocarbon substances produced from

lands in or offshore of Ventura or Santa Barbara Counties, not to exceed in the aggregate, however, a term of 99 years."

3. That portion of paragraph 1 of said lease which reads as follows:

"1. For the rights granted to it hereby Lessee shall pay to Lessor a sum of money equal to 2% of the cash amount or value of all royalties or other considerations which shall be paid by Lessee to the State of California during the term of this lease upon production of oil, gas or other hydrocarbon substances from all oil and gas leases held by Lessee covering tide and submerged lands located wholly or partially within the Tideland Area. In the event Lessee shall use any gasoline plants and facilities which it shall construct upon the Operating Base for the treating and processing of gas produced from leases covering tide and submerged lands which are located wholly or partially within the Tideland Area by producers who have no agreement with Lessor for the payment to Lessor of a rental, royalty, or percentage regarding the gas so produced, Lessee shall also pay to Lessor a sum equal to 2% of the cash amount or value of all royalties or other considerations which shall be paid by such producer to the State of California upon such gas so treated or processed."

shall be and the same is hereby modified to read as follows:

"1. For the rights granted to it hereby Lessee shall pay to Lessor a sum of money equal to 2% of the cash amount or value of all royalties or other considerations which shall be paid by Lessee to its Lessor under the apposite lease during the term of this lease upon production of oil, gas or other hydrocarbon substances from all oil and gas leases held

by Lessee, the productien from which is treated, stored or transported on or over said Hollister Estate Lands. In the event Lessee shall use any plants and facilities which it shall construct upon the Operating Base for the treating and processing of oil, gas or other hydrocarbon substances produced by producers who have no agreement with Lessor for the payment to Lessor of a rental, royalty, or percentage regarding the hydrocarbon substances so produced, Lessee shall also pay to Lessor a sum equal to 2% of the cash amount or value of all royalties or other considerations which shall be paid by such producer to the Lessor under the apposite lease covering the lands from which said substances are produced upon such oil, gas or other hydrocarbon substances so treated or processed."

* * *

IN WITNESS WHEREOF, the parties hereto have executed this agreement, in duplicate, as of the day and year first above written.

[Subscriptions omitted in printing]

PIPELINE FRANCHISE ISSUED BY CITY OF SEAL BEACH

ORDINANCE NO. 463

AN ORDINANCE OF THE CITY OF SEAL BEACH, CALIFORNIA, GRANTING TO MONTEREY OIL COMPANY, A CORPORATION, AND THE TEXAS COMPANY, A CORPORATION, JOINTLY, THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, A FRANCHISE TO LAY, CONSTRUCT, CONNECT WITH OTHER PIPE LINES, MAINTAIN, OPERATE, REPAIR, RENEW, ALTER, CHANGE THE SIZE AND NUMBER OF, REMOVE AND ABANDON CONDUITS, MAINS AND PIPE LINES FOR THE TRANSPORTATION OF OIL, PETROLEUM, GAS, GASOLINE, WATER AND OTHER SUBSTANCES, TOGETHER WITH ALL MANHOLES, VALVES, APPURTENANCES AND SERVICE CONNECTIONS, INCLUDING TELEPHONE LINES ON POLES OR IN CONDUITS, USED IN CONNECTION THEREWITH, IN, UNDER, ALONG AND ACROSS ALL PUBLIC HIGHWAYS, STREETS, AND ALLEYS IN THE CITY OF SEAL BEACH.

The City Council of the City of Seal Beach, does ordain as follows:

SECTION 1: **That a franchise and privilege is hereby granted to Monterey Oil Company, a corporation, and The Texas Company, a corporation, jointly, their respective successors and assigns, to construct from time to time, and, for a period of thirty (30) years from and after the date upon which this ordinance becomes effective, to lay, construct, connect with other pipe lines, maintain, operate, repair, renew, alter, change the size and number of, remove and abandon conduits, mains and pipe lines for the transportation of oil, petroleum, gas, gasoline, water and other substances together with all manholes,**

valves, appurtenances and service connections, including telephone lines on poles or in conduits used in connection therewith, necessary or convenient for the operation of such conduits, mains and pipe lines in, under, along and across all public highways, streets and alleys, and public places now or hereafter dedicated to public use within the City of Seal Beach, California, hereinafter referred to as "the City".

SECTION 2: This franchise is granted on the terms and conditions hereinafter contained, and the grantees shall file with the City Clerk of the City of Seal Beach a written acceptance hereof within thirty (30) days after the passage of this ordinance. The word "grantees" whenever used herein shall mean and include Monterey Oil Company and The Texas Company, jointly, their respective successors and assigns.

SECTION 3: The term of the franchise and privilege hereby granted shall by thirty (30) years from and after the date on which this ordinance becomes effective.

SECTION 4: The grantees shall have the right, subject to such regulations as are now or hereafter may be in force, to make all necessary excavations in said public highways, streets and alleys and public places for the laying, construction, connection with other pipe lines, maintenance, operation, repair, renewal, alteration, change in the size and number of, removal and abandonment of said conduits, mains, pipe lines, manholes, valves, appurtenances and service connections, including telephone lines on poles or in conduits, used in connection with said pipe lines. Before any conduit, main, pipe line or telephone line is constructed or abandoned a permit shall be secured from the City Council specifying the best and most desirable routing of said conduits, mains and lines, or the conditions under which they may be abandoned, as the case may be, and the City Council's decision on said

routing and conditions shall be final and binding on the grantees.

SECTION 5: The work of laying, constructing, connecting with other pipe lines, maintaining, operating, repairing, renewing, altering, changing the size and number of, removing and abandoning conduits, mains, pipe lines and telephone lines shall be conducted with the least possible obstruction and inconvenience to the public and with the least possible hindrance to the use of the highways, streets, alleys and public places for purposes of travel. All excavations shall be backfilled and the surface placed in as good condition as it was in at the beginning of such work and to the satisfaction of the Street Superintendent of the City. The grantees and each of them shall hold the City, its City Council and other officers, harmless from any claims for damage or injury suffered by any person by reason of any excavation or obstruction in said highways, streets alleys and public places occasioned by the laying, construction, connection with other pipe lines, maintenance, operation, repair, renewal, alteration, removal or abandonment of any conduits, mains, pipe lines or telephone lines of the grantees under this franchise and shall be responsible for such damage or injury.

• • •

SECTION 8: The grantees shall, during the life of this franchise, pay to the City, in lawful money of the United States, a sum equal to two per cent (2%) of the royalties paid by grantees to the State of California with respect to such oil, petroleum, gas and other hydrocarbon substances as are produced by means of offshore wells drilled on and bottomed under tide and submerged lands of the Pacific Ocean and are transported through any conduit, main or pipe line laid, constructed, maintained or operated under this franchise and then subject thereto. Each time that grantees or either of them shall during the life of this franchise pay any of the aforesaid royalties

to the State of California said grantees or grantee shall pay the City the sum equal to two per cent (2%) thereof to which the City is entitled as aforesaid and shall file with the City Clerk, a statement, verified by an officer or agent of such grantee or by respective officers or agents of the grantees, each of whom is authorized by law to make verified statements on behalf of the grantee of which he is an officer or agent, showing the aforesaid royalties with respect to which that payment to the City is being made. Commencing at the beginning of the sixth year after the date of this franchise and continuing during the then remaining life of this franchise, grantees shall pay to the City, in lawful money of the United States, two per cent (2%) of the gross annual receipts of the grantees arising from the use, operation or possession of this franchise, the same to be payable annually on or before the first day of April in each year with respect to gross receipts derived by the grantees from their operation of such conduits, mains and pipe lines during the year ending December 31, next preceding, *provided, however,* that any and all payments made by grantees or either of them to the City during such year ending December 31, next preceding, based upon royalties paid to the State shall be credited upon any sums which shall accrue under this sentence based upon said gross receipts during such year. With respect to the first and last calendar years for which the two per cent (2%) of the gross annual receipts is payable, such payments and the credits thereon shall be pro-rated according to the period of time this franchise shall have been in effect during such respective years. Annually on or before each such first day of April, grantees or either of them shall file with the City Clerk a statement, verified as aforesaid, showing their gross annual receipts from the operation of said conduits, mains and pipe lines during the year ending December 31, next preceding, and showing also the aggregate of the aforesaid royalties paid to the State

during such year. It is further provided that in no event shall the amount which the grantees shall be obligated to pay to the City hereinunder be less than a sum equal to two per cent (2%) of the royalties paid by grantees to the State of California as aforesaid.

* * *

SECTION 13: This franchise is not and shall not be exclusive.

SECTION 14: This ordinance shall take effect thirty (30) days after its adoption and the City Clerk shall certify to the passage and adoption of this ordinance, and shall cause the same to be published once in "The Seal Beach Post and Wave", a weekly newspaper of general circulation published and circulated within the City of Seal Beach, and which is hereby designated for that purpose.

PASSED, ADOPTED AND APPROVED this 13th day of December, 1954.

[Subscriptions omitted in printing]

STATE LANDS COMMISSION MEMORANDUM DATED AUGUST 8, 1975

Pursuant to the leads Mr. Northrop vocalized on July 25, 1975, in a meeting in his office, I have talked to the parties suggested as well as others. Listed are the parties contacted and a summary of the conversations.

Bob Johnston Victory Oil Company (213) 636-7454	Mr. Johnston was unable to think of any lease based on throughput. Suggested that if anyone might, that the cities of Torrance or Huntington Beach would be one of the first to lease in such a manner.
John Clark City of Torrance (213) 328-5310, Ext. 232	The City of Torrance has franchises based on the Broughton Act. Some of their leases are also tied to the Wholesale Price Index.
Jim Hibbart City of Huntington Beach (714) 536-5431	Informed me that the City of Huntington Beach has *no* franchise leases. Applicants are required to file plans for pipelines for engineering checking and review. No rentals received.
Jim Gilstrap (714) 551-6849	Several phone calls to Mr. Gilstrap resulted in his voicing of the gut feeling that as a general practice, such a rental rate is *not* being charged. Will phone if able to think of any lands.
Ray Bradley Berry Holding Co. (805) 769-8226	Mr. Bradley informed me that he had *no* knowledge of any lease based on throughput. Suggested I talk to Finn Moller of USA Service Station.
Fritz Dawson USA Service Station (213) 829-4383	Finn Moller referred me to Fritz Dawson who formerly worked with Continental Oil Company. Mr. Dawson stated he had never heard of such a precedent. He asked a few questions about the proposed regulations, and then expressed concern about the cumulative effect of such a policy.

Ken Montgomery City of Norwalk (213) 868-3254	The City of Norwalk bases its rental rate on a schedule similar to past State Lands Commission policy, i.e. 1¢/diameter inch/lineal foot. They differ, however, in that the 1¢ is multiplied by the cost of living index. Additionally all pipelines under 8" are billed as if they are 8".
Walter E. Plumb Port of Stockton	The Port of Stockton wharfage fee of .35/ton includes cost of construction, maintenance and replacement of facilities. Southern Pacific Pipeline Company is paying ½¢ for all volumes which cross the port's upland property. Pipeline is maintained by Southern Pacific.

JAMES F. FIACK
Analyst

STATE LANDS COMMISSION MEMORANDUM DATED AUGUST 11, 1975

I contacted Mr. R. Tom Benson, Executive Vice President of Universal Field Services located in Tulsa, Oklahoma and asked if he had any knowledge of or experience with throughput compensation. Mr. Benson emphatically stated that he had, in all of his years of experience, never heard of or acquired rights of way on the basis of throughput. He stated that there had been many instances where it had been tried by landowners, but that it had never been settled on that basis. Universal Field Services is one of the largest right-of-way acquisition organizations in the world. Mr. Benson's telephone number is (918) 628-1620 and his mailing address is P.O. Box 166, Tulsa, Oklahoma 74101.

I also contacted Mr. Ray Long, Vice President of Coats Field Services in Redwood City and asked him the same questions I asked Mr. Benson. Mr. Long said he had been in the business since 1938 and had never made a settlement or heard of a settlement being made on the basis of throughput. He or his company has worked on various pipelines from Texas to California and the Canadian pipeline; and in all of those thousands of miles, there was no throughput compensation. Mr. Long's telephone number is (415) 365-2300 and his mailing address is 43 Woodsworth Avenue, Redwood City, CA 94062.

I contacted Mr. Robert McCue, National Vice President of the American Right of Way Association, who is employed in the headquarters office of CalTrans in Sacra-

mento. Mr. McCue has no knowledge of any throughput as a basis of right of way compensation.

/s/ Linson L. Patton
Supervising Land Agent
Land Transactions

LLP/cap

bcc: J. F. Trout
L. H. Grimes
G. R. Horn
J. Fiack

FINAL REPORT AND COST FORMULA

FOR THE

CALIFORNIA ASSOCIATION OF

PORT AUTHORITIES

San Francisco, California, May 30, 1974

[Table of Contents omitted in printing]

MAIN LAFRENTZ & CO.
One California Street, San Francisco 94111
415-981-2156

The Members of the California Association
of Port Authorities

On August 11, 1971, we submitted a report to your membership described as "Preliminary Report and Cost Formula for the California Association of Port Authorities".

Since that date, various cost studies in compliance with the cost formula have been made by seven members and were reviewed by us. Our evaluation of the results, along with our comments and recommendations, were considered by your Economics and Finance Committee and your Advisory Committee.

On March 8, 1974, the Association approved various policies relating to the cost formula and authorized the preparation of this final report. The first ten chapters of the final report are unchanged in substance, but have been changed to the extent necessary to incorporate policy decisions of the Association. Chapter Eleven has been re-written completely as its contents in the preliminary report were mainly recommendations. In this report, its contents are conclusive.

MAIN LAFRENTZ & CO.
/s/ Philip E. Linnekin

San Francisco, California
May 30, 1974

Common Abbreviations

FMB, FMC or THE COMMISSION
Federal Maritime Commission or its Predecessor

THE ASSOCIATION or CAPA
California Association of Port Authorities

THE COMMITTEE
Economic and Finance Committee, CAPA

CHAPTER ONE — THE FREAS FORMULA

Origin

On November 7, 1944 the United States Maritime Commission (Predecessor to the present Federal Maritime Commission) instituted an order of inquiry in Docket No. 640, Terminal Rate Structure—California Ports. The Commission engaged MR. HOWARD G. FREAS as an independent consultant to make a study of ten California public ports or private marine terminals, each of whom were signatory to U.S.M.C. Agreement No. 7345, authorized and approved pursuant to Section 15 of the Shipping Act, 1916. Under the terms of the agreement, the members associated themselves under the name "California Association of Port Authorities."

This Association was formed on April 12, 1940 and exists today with but minor changes in its membership. The objectives and purposes of the Association in the main are "to promote fair and honorable business practices among those engaged in the marine terminal industry, to more adequately serve the interests of the shipping public at their terminals in the State of California and to establish and maintain just and reasonable, and, as far as practicable, uniform terminal rates, charges, classifications, rules, regulations and practices at such terminals for or in connection with interstate and foreign waterborne traffic . . . ." (quoted from Agreement No. 7345).

Purpose

The purpose of the study, in the language of the order of inquiry, was to obtain information as to (1) a proper basis for the segregation of those services and costs thereof, rendered for the account of the vessel from those rendered for the account of the cargo, (2) a proper basis for allocating costs assignable to the vessel as between Dockage, Service Charge and other services rendered to the vessel, (3) a proper basis for allocating costs assigned to the cargo as between Wharfage, Wharf Demurrage and Storage and other services rendered to

the cargo, (4) a proper basis for determining carrying charges on waterways, land, structures, and other terminal property devoted to furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water, and (5) any other services and costs necessary to a determination of the above-mentioned bases.

Background and Scope of Study

The Freas study commenced with a review of a previous study by Dr. Ford K. Edwards, who at that time was Transportation Economist for the California Railroad Commission. The Edwards report was dated May 16, 1936 and was called "A Formula for the Determination of Port and Marine Terminal Costs for Rate Making Purposes." It was introduced in the record of the U. S. Maritime Commission in Docket 555.

The Edwards study was limited to privately-operated marine terminals in the San Francisco bay area, who at that time came under the regulatory influence of the California Railroad Commission (now Public Utilities Commission). It did not include publicly-owned ports, although Edwards reported that officials of such bay area ports were consulted and cooperated freely with him.

All of the entities studied by Edwards were not only privately owned, but were also operating terminals. An operating marine terminal provides facilities for the accommodation of vessels and cargo, but also provides cargo handling and clerical services (except stevedoring) necessary to the interchange of cargo between water and land carriers. This is in contrast to the so-called landlord port, which provides terminal facilities but does not perform services. In the latter situation terminal services are performed either by steamship companies themselves, or by terminal operators under contract.

The Freas study was of broader scope than the Edwards study in several respects:

1. It covered both operating and non-operating terminals.

2. It covered public ports as well as private terminals.

3. It included the Port of Stockton and Southern California ports as well as bay area ports.

Although broader in scope, the Freas study generally followed the Edwards study in the underlying principles of cost determination and allocation, and to some extent simplified cost allocation processes. The basic principle underlying the cost allocations is the same in both studies. Simply stated, the costs are allocated according to use by vessel or cargo, and to the various services provided for each. The underlying conclusion of each is that the vessel is responsible to the port for all usages and services from, but not including the point of rest on outbound traffic, and to but not including the point of rest on inbound traffic. This principle has been followed in many terminal rate cases on the Pacific Coast. It is as equally valid for this study as it was held to be by Freas and Edwards.

FMC Approval

The Freas study culminated in a report of 184 pages entitled "A Study of Terminal Operations Including a Formula for Cost Finding," dated September 9, 1946. The report included a blank formula and a detailed explanation of the cost determination and allocation process. It was accompanied by a completed cost formula for each of the ten ports included, based upon the fiscal year ended June 30, 1940. This year was believed to be the most recent period available at the time not distorted by wartime abnormalities.

Formal hearings were held by the Commission and its decision was rendered on August 24, 1948 (3 USMC 57). The trial examiner's conclusions resulted in seven recommendations to the Commission, the first two of which,

as follows, were adopted by the Commission: (1) Approve the formula as a proper method of segregating terminal costs and charges to the various wharfinger services, (2) Find that respondents operating publicly-owned terminals are entitled to a fair return on investment. The other recommendations of the examiner dealt with the proper treatment of gift property, rate base and rate of return. Although the Commission did not approve those recommendations, its decision included the following language. "It is realized that some basis must be used in computing carrying charges and respondents are not foreclosed from using any basis which they are prepared to justify as producing reasonable rates called for by their agreement."

Subsequent Developments

Since its approval by the Commission, the Freas Formula has exerted an ever-expanding influence on rate making processes on the Pacific Coast, and to some extent other coastal areas of the United States.

This Association has made annual studies almost without exception since 1952. Composite data for the membership have provided a basic point of departure for measuring the adequacy of rates and for attaining a high degree of uniformity in published tariff charges to vessel and cargo. In addition, certain underlying principles of cost determination and allocation have had some influence in the negotiation of preferential assignments and leases related to the container revolution.

With minor modification, the formula was approved by the Commission for Pacific Northwest Ports in FMC Docket No. 744 "Terminal Rate Structure—Pacific Northwest Ports," decided June 8, 1956 (5 FMB 53).

With substantial modification, it was also approved by the Commission for grain terminals, FMC Docket 66-48

"Rules and Practices of Pacific Northwest Tidewater Elevators Association," served March 8, 1968.

It has been referred to frequently in many other matters of marine terminal litigation on the Pacific Coast, and even the Port of Chicago and the Commonwealth of Puerto Rico.

It not only has the sanctity of approval by the Federal Maritime Commission. It is a creation with its origin in the Commission's own order of inquiry. It has done much for those segments of the industry with the vision to see its value in contributing to the development of fair and reasonable rates and such uniformity as is practicable. It has far surpassed the vision of its own creator, Howard Freas.

CHAPTER TWO — THE NEED FOR CHANGE

Construction and Operation

As previously observed, the Freas Formula was created in 1946, based upon operations for the fiscal year ended June 30, 1940.

No purpose would be served to describe the many changes of design and materials in terminal construction that have occurred in the last thirty years. Terminal construction has had to keep pace with vessel construction with the common goal of a fast turn around of the vessel in port.

Operationally as well, there have been ever-changing patterns. From the tractor and four-wheeler of pre-World War II, there was a transition to fork lifts and pallets, pre-palletizing of unitized cargo, then containers integrated with land carriers, all of this related to general cargo. The postwar demand for bulk cargoes in the Pacific Basin also created new dimensions in the operations of Pacific Coast ports. The growth of the trucking industry seriously affected the coastwise and intercoastal trades,

and contributed to the rapid obsolescence of marine terminal facilities constructed when land carriage by rail was predominant.

The priority goal in the industry is to reduce the cost of labor. With labor prices going up and efficiency relatively unchanging, the only solution is to reduce the quantity of labor required. Thus, the industry turned to capital to provide the facilities for storage and handling at the terminal and for carriage on land and sea.

ORGANIZATION CHANGE

The need for capital funds of such magnitude heralded the gradual demise of the private terminal operator. The private operators had generated greater efficiency in handling labor, and were generally taking the lead in ratemaking. The traditional approach for them was to make formal application to the Public Utilities Commission for rate increases, which when granted, were conditioned upon public ports adopting the same rate levels.

This was why the Edwards study was limited to private terminals, recognizing the regulatory requirements of the time. The Freas study, not greatly removed in time, and following the Edwards study, was also geared more to the precise cost requirements of the private terminals, all of whom were operating terminals, than to the landlord ports. It naturally followed that the Freas Formula was as much concerned about the labor costs of the operating terminals as with the capital costs.

The Association goal of uniformity likewise was thrust toward uniform rates for Accessorial Services as well as for rates for the use of facilities. The goal of uniformity today is limited, however, to those rates associated with the use of facilities, viz; Dockage, Wharfage, Wharf Demurrage and Storage, and being limited further to those facilities provided on a basis of published tariffs. Although it is still necessary to determine costs of the Accessorial Ser-

vices, it is considered to be more of an individual port problem rather than an Association matter.

The present study, therefore, is directed primarily to the development of costs of those services common to all members and where uniformity is of interest to them individually as well as through Association membership. At the same time, however, to be as meaningful as possible to individual members, the cost formula provides for the accumulation of the cost of Accessorial Services and for the costs of those facilities provided to the public on a basis of other than published tariffs.

It is well to emphasize at this time that costs in themselves do not dictate rates. Cost is but one of the factors to be considered in rate-making. Other factors include volume, value, competition, what the traffic will bear, etc. The sole objective of this study is the determination of cost on as uniform a basis as possible to achieve the common goals of the Association as a whole, and to permit further refinement as desired by the individual members.

CHAPTER THREE—SCOPE OF PRESENT STUDY

The following members of the California Association of Port Authorities are included in this study.

ENCINAL TERMINALS
PORT OF LONG BEACH
PORT OF LOS ANGELES
PORT OF OAKLAND
PORT OF SACRAMENTO
PORT OF SAN DIEGO
PORT OF SAN FRANCISCO

Physical inspections were made of their facilities, and key personnel were interviewed as necessary during the study. All underlying financial and statistical data used in the study were furnished by port personnel and were not inde-

pendently verified by reference to port records or by the application of generally accepted auditing standards. Composite figures for the Association were compiled from the figures furnished by the individual members.

The Association directed that the study develop a uniform method of determining the cost of Dockage, Wharfage, Wharf Demurrage and Storage at various facilities provided to the public on a published tariff basis. The facilities to be included are as follows:

General cargo, break-bulk

General cargo, container

General cargo, combination break-bulk and container

Dry bulk

Liquid bulk

Ensuing discussion with the Economic and Finance Committee of the Association indicated a need for consideration of the costs of cranes at general cargo wharves. Provision for this has accordingly been made in the cost formula.

In order to serve the needs of the operating terminals, provision is made in the cost formula for the accumulation of the costs of Accessorial Services. Such services include the Service Charge, Car Loading and Unloading, Truck Loading and Unloading, and a variety of other services for vessel and for cargo. Although not of interest to the entire Association, they are important to operating ports. And although uniformity of rates is a secondary issue, suggestions are made in the cost formula for a reasonable degree of uniformity in the accumulation of costs of such services.

Another reason for this treatment is compatibility with northwest ports. Most of the northwest ports are operating ports, and their costs over the years have also been patterned largely by the Freas Formula. It would be undesirable to develop a cost formula for California ports that

would be an extreme departure from principles and methods that have been generally followed on the entire Pacific Coast.

As mentioned previously, certain Association members are just as concerned about costs of their special facilities as they are about the published tariff facilities. Provision is accordingly made in the cost formula for the accumulation of such costs in total, and a special schedule is provided for detailed refinements as desired. General guide lines are suggested for such refinements.

CHAPTER FOUR—THE RATE BASE

Where capital investment is the predominant production factor in an industry, rates must be established at a sufficient level to provide for both the return of capital (or as will be shown later, its reproduction) and a reasonable return on capital. This is a fundamental principle pertaining to all regulated industries and particularly those which are public utilities. Ports are generally considered to be public utilities, although in some respects, such as their providing special facilities for single users, they would not be public utilities.

The valuation of port properties devoted to public use, commonly called the "rate base," is the most important and the initial point of departure in rate-making, and thus of cost finding for rate-making purposes.

The problem is one of considerable magnitude. The solution requires a look at the past, present, and future. Terminal facilities of various ages, but generally constructed through a constant period of rising costs must be valued fairly for both present and future users. Costs of the past reflected in user rates of the past are meaningless, unless the rate increases of the past have kept abreast of the cost increases. The experience of this Association indicates that the rates of its members have not kept up with the cost increases.

One inescapable influence of the past, however, and a continuing influence on the present and future, is that exerted by the regulatory body of jurisdiction. As to ports, this body at present is the Federal Maritime Commission. At an earlier time, the Public Utilities Commission of California exercised similar authority over the private terminal industry.

Both the Edwards and Freas studies were oriented toward the regulatory influence. As a matter of fact, Edwards was employed by the Public Utilities Commission when he made his study. Freas was under contract to the Federal Maritime Commission. It naturally follows that any successor study that adopts similar principles would be ill-conceived if it were not to consider this very important premise. It becomes even more essential when departures from precedent are involved. A dramatic departure is involved herein by the recommendation to adopt reproduction cost as the rate base.

HISTORY—THE EDWARDS STUDY

The Edwards Study adopted a rate base of current market values for land and undepreciated original cost of improvements and equipment. This rate base was approved by the Public Utilities Commission and was recognized as proper by it in a number of rate cases of private terminal operators.

Edwards justified the use of undepreciated cost as a rate base partly because of his use of a sinking fund method for annual depreciation instead of straight-line depreciation. The following is quoted from his report, Page 178. "Depreciation was charged off upon a 5% sinking fund basis, wherein equal annual payments are set aside out of operating revenues which, compounded at 5 percent interest, will accumulate to a sufficient amount at the end of the service life of the unit *to replace it at its original cost.*" (emphasis supplied)

A further reason was his conclusion that at that time reproduction costs would have been substantially the same as the original costs of the properties. On Page 186 he stated the following: "In accordance with the use of the sinking fund method of depreciation, the original cost of the properties was used as a rate base. A check at one of the major terminals applying the straight-line method and a depreciated value based upon the estimated remaining service lives of the major property units showed little change in the results obtained.

A check of the construction costs of new wharf units built within the past two years indicates that the costs differ very little from the costs of similar construction approximately ten years previous when many of the units now in existence were built. *The authors conclude that the reproduction costs now are substantially the same as the original costs of the properties.*" (emphasis supplied)

Implicit in the above is the fact that the Edwards depreciation and rate base decisions were geared to the then prevailing economic situation. Construction costs were stable. Thus depreciation provisions need only be sufficient to replace the property at its "original costs." Likewise the rate base and consequent return on capital needed only to be geared to original cost. The Edwards logic and reasoning in a period of stable construction costs suggests strongly that different conclusions would have been reached in today's economy. The thirty-five years since the Edwards Study have been characterized in the main by steadily rising costs, and there are no indications of this trend being arrested. Edwards would undoubtedly have made a strong case for a reproduction cost rate base under modern conditions.

HISTORY—THE FREAS STUDY

Freas, like Edwards, adopted current market values as a rate base for land. He makes quite clear what is to be re-

flected in such values on Page 52 of his report. "Market values of land are enhanced by improvements, such as reclamation, drainage, bulkheads or seawalls necessary to protect land . . . . . ., dredging and breakwaters, ... lighthouses and channel lights. The cost of such improvements, by whomsoever incurred, is therefore reflected in the value of the land. It is not otherwise considered in setting up the rate base. This does not apply, however, to fills, drainage facilities, or bulkheads constructed in connection with particular structures, maintenance dredging, or the operation of any facilities."

With regard to rate base and depreciation of buildings and improvements, Freas shares some of Edwards' views, but the World War II push into the rising cost economy begins to emerge and adds further dimension to the Edwards' views. The following is extracted from Pages 53-56 of the Freas report (in part only).

"For purposes of computing depreciation, the writer advocates the use, wherever practicable, of original costs. The determination of a rate base, however, should not be so narrowly grounded. *Original costs are still important, but they are not the sole criteria. To the extent that it is practicable to do so all elements of value should, in this instance, be considered. Important among these other elements is the cost of reproducing the property.* (emphasis supplied)

Regardless of the standards employed for determining the measure of the rate base, careful consideration must be given to the question of depreciation. Excepting when a practice of setting up a depreciation reserve and crediting it with appropriate earnings is followed, it is the value of the property at the time in issue that indicates the probable measure of the rate base. Depreciation has been computed by the straight-line method; accordingly, considerations of value have been on a depreciated basis."

HISTORY—THE FMC ATTITUDE

In its decision in Docket 640 and all subsequent cases involving marine terminal *published tariff* rates, the Federal Maritime Commission (and predecessors) have taken a consistent and lenient position with respect to the rate base. Although not adopting or approving any specific basis of valuation in Docket 640, it concluded that "respondents (members of the CAPA) are not foreclosed from using any basis which they are prepared to justify as producing reasonable rates called for by their agreement."

The basis used by CAPA members until the present time has been current market value of land and depreciated original costs for improvements, with depreciation provisions on the straight-line method. In the opinion of the CAPA and in our opinion, depreciated original cost as a rate basis is no longer valid in the current economic circumstances.

The only known case where reproduction costs were used by respondents in a terminal rate proceeding was in FMC Docket 66-48 "Rules and Practices of the Pacific Northwest Tidewater Elevators Association" decided March 8, 1968. This case involved eight marine grain terminals in the northwest. Reproduction costs were used basically for the following reasons:

1. Ages of the elevators were in great variance, ranging from two to forty years.

2. Original cost data, although available generally, was not available in the precise detail needed for cost allocation (a considerably greater problem at a grain terminal than at a general cargo terminal, due to the complexity of the facilities).

3. Reproduction cost appraisals were available in most instances in sufficient detail for cost allocation purposes.

4. Where uniformity was an important objective, reproduction cost data permitted a considerably greater degree of uniformity in the cost approach.

5. It was far more realistic in the economic conditions of the time, and for the foreseeable future.

The trial examiner concluded in his recommended decision that "depreciation and return on investment are properly based on original cost rather than reproduction cost and a rate of return on this base that does not exceed ten percent after taxes, in the circumstances prevailing here, does not constitute an unjust or unreasonable practice."

The Commission neither agreed nor disagreed with the examiner, although it did adopt his decision in support of the respondents. The Commission's conclusion is most interesting, as follows:

"There is some language in the initial decision which, despite the examiner's careful disclaimer, might be interpreted to mean that we are attempting to subject terminals' overall rate structures and levels of return to the same kind of regulation which we exercise over carrier rates under the Intercoastal Act. We do not believe that the conclusion of the examiner with respect to the reasonableness of respondents' rate of return on investment or his conclusions concerning the inclusion of leased property in the rate base, and respondents' method of valuing land and plant facilities, were necessary or relevant, to his conclusions under the second paragraph of Section 17, which is addressed to unjust or unreasonable practices or regulations. *Thus, in adopting his initial decision, we neither agree nor disagree with these conclusions or the reasons supporting them.*" (emphasis supplied)

The Commission thus tacitly recognizes and admits to less regulatory authority over marine terminals than it exercises over intercoastal water carriers. As to the rate base, it is interesting to note that the examiner's decision to reject reproduction cost recommended adoption of depreciated original cost, the so-called "prudent investment" theory that the Commission has followed consistently in car-

rier cases. Thus, even where the Commission had ample precedent in carrier cases to support the examiner, it did not do so. One respects its reluctance to extend its jurisdiction on legal grounds, but one can only conjecture as to its economic theory. They appear to be reaffirming the predecessor position in Docket 640, but without a direct reference thereto.

It is worth mentioning at this point that the rate base is far more important to ports and terminals than it is to water carriers. Water carriers have substantial costs for vessel and shoreside wages, voyage and vessel operating costs, cargo handling, etc. Labor and other predominantly variable costs account for the major portion of total costs. Thus, capital costs are of less impact on their rate structures. Ports and terminals, especially the non-operating, are characterized mainly by fixed costs related to capital investments. Thus, rate base and rate of return are extremely critical considerations in costing as a prelude to rate-making.

THE CASE FOR REPRODUCTION COST AS THE RATE BASE

The observations by Edwards and Freas and the attitude of the Federal Maritime Commission at that time provide abundant background for reproduction cost as a rate base for marine terminals. The more recent (1968) attitude of the Commission (Docket 66-48) in refusing to extend its powers is also encouraging.

The economic facts of today, however, provide the most compelling and realistic grounds for adopting reproduction cost as a rate base for port structures. Some of these facts are as follows:

1. Many port facilities are still used and useful, although they were originally constructed prior to or immediately after World War II.

2. Older facilities built in low cost construction years must be replaced in high cost construction periods.

3. Port facilities constructed in the last twenty years reflect ever increasing cost levels.

4. Ocean carriers, particularly American flag lines, are severely burdened with capital improvements, particularly with respect to advanced technology of cargo handling and packaging. They must look to the ports for construction of terminal facilities.

5. Except in rare situations, such as captive cargo controlled by oil refineries, shippers cannot economically build their own terminals and use them to optimum efficiency.

6. Ports are competitive, yet strive toward uniformity in the interest of the shipping public. Unless port properties are valued at uniform cost levels, considerable latitude may be exercised in rates and practices. Low rates based upon inferior physical facilities could lead to serious deterioration in quality of service.

7. Reproduction cost provides a procedure for recognizing periods of declining prices as well as periods of rising prices.

8. It is an acceptable method of recognizing the fair value of property devoted to public use today, and to measure the adequacy of rate structures designed to restore or replace the property when it is no longer used or useful.

9. By applying this method in measuring the construction costs and establishing rates for published tariff facilities, a close parity will exist with container facilities, all of which were built at relatively current construction cost periods (and many of which are still under construction).

MARKET VALUE OF LAND

There appears to be no dissension within the terminal industry or the regulatory agencies with respect to the valuation of land. Edwards, Freas, and the Public Utilities Commission of California all agreed with this treatment. And the Federal Maritime Commission, although not approving the concept per se in Docket 640 or in Docket 66-48, neither did it disapprove. More positively, they have given their acquiescence in a number of recent cases involving preferential assignments and leases of containerized facilities.

In adopting current market value of land as a part of the rate base, however, certain limitations and guidelines should be meticulously followed:

1. As previously observed (citing the Freas study) bulkheads, breakwaters, seawalls, original dredging, etc. are the expenditures which give the land its value. Such expenditures cannot thus be included as a cost of improvements unless they are an integral part of the construction of a particular facility. Care must be exercised that the same values do not appear in the rate base in more than one form.
2. The current market values should be related to use as a marine terminal, contrary to the general practice of valuing land at its highest and best use.
3. The value should be expressed on a per square foot unit, and limited to "surface" land. "Surface" land for this purpose should include all land of the terminal facilities devoted directly to the marine terminal function, and various support areas such as parking, offices, roadways, etc. No waterway should be included for the purpose of determining total value, except where it may lie under a wharf structure. Recognizing that the water access is the dominant feature in establishing value, however, provision is made for waterways in the cost allocations. Non-

revenue producing land should be included to the extent that it contributes to the wharfinger operation. Such non-revenue lands may include administration buildings, shops, access roads, etc.

4. Land values fluctuate considerably between ports in metropolitan coastal areas and those in inland waterway areas. For purposes of uniformity, therefore, a weighted average of all ports should be used. The composite results for the Association will be identical on a weighted average basis to the results obtained by each port using its own value. A uniform value has another benefit in that it would prevent those ports with low land value from establishing low rates to gain a competitive advantage. The only detriment to using the weighted average method is that on this method the values of the larger ports will tend to dominate.

5. Values should be established by competent authority. From an evidential point of view the values would be most meaningful if they were made by independent outside appraisers. It is doubtful that such people, however, would be more competent than port engineers or property managers. In any event, where competency of port personnel is questionable, independent appraisals are desirable.

NOTE: Competency and independence are equally important in establishing reproduction costs as they are for land values.

DEPRECIATION

The function of depreciation accounting normally provides for a systematic charge to operating expenses of the cost of a capital asset over its estimated useful life. Three things of value to management are accomplished in this exercise.

1. Net earnings for a given period reflect the proportionate contribution of the capital asset and are thus not overstated.

2. The amount written off becomes a "fund" retained in the business (by reducing the amount of retained earnings available for dividends).

3. The assets of the business are stated conservatively by a reduction of the accumulated depreciation from the cost.

A generally accepted principle of accounting requires that for financial reporting purposes, capital assets and their systematic charges to operations be based upon cost. There are those in the financial and accounting world who challenge this concept for financial reporting, but independent public accountants may not give unqualified opinions on financial statements on any other basis. Regulatory bodies have yet to permit depreciation expenses for rate-making purposes on any basis other than the cost recovery method.

This Association generally takes the position that the rate base is properly based upon depreciated reproduction cost and that annual depreciation should likewise be based. The theoretical position is that the related properties cannot be reproduced at the same cost levels that they were originally constructed. This is an indisputable fact. But the basic theory of rate-making is that the rate payer must pay for a return of capital (depreciation) and a return on capital (cost of money, risk, profit, etc.).

It does not seem reasonable or fair to charge depreciation to the present user of a terminal property on any basis other than the recovery of the original cost of property devoted to his use. This would be contrary to all generally accepted accounting practices, and particularly as applied by regulatory authority. The problem of replacement of property at inflated price levels is more logically and justifiably the function of the rate base and the rate of return.

GIFT AND RENTED PROPERTY

At the time of the Freas study, three of the private terminals leased all or a substantial portion of their terminal facilities from public ports and, in one case, from a municipality. In those instances, actual rentals were ignored, and the lessor's carrying charges were used in lieu. Although this is not a problem in the present study, it could be in future studies.

A similar approach was used in the grain terminal study in the northwest (Docket 66-48) with which the examiner concurred. We are in agreement with Freas in this area, and generally for similar reasons, briefly as follows:

1. Uniformity in the cost system.
2. Avoidance of precise determination as to the reasonableness of rentals which are frequently negotiated under unusual circumstances.
3. Difficulty of providing for a profit factor on a leased terminal, as contrasted to the return on investment approach.

The subject of gift property was treated at some length by Freas, but he was somewhat vague as to conclusion. He generally concluded that gift property should not be included in the rate base, but that it was proper to include depreciation as an expense. With the exception of land, there was very little gift property. It seems proper to include the land under the current market value theory, particularly as so many sustained costs that give the land its value are otherwise not included.

Gift property currently is of considerably greater magnitude. Federal grant programs, particularly in poverty and distressed areas, have been quite prominent at some of the ports. The amount of such gifts may be as high as 50% of the total construction cost. There is no doubt but that the main purpose of such gifts is to assist public ports to construct facilities which will create jobs.

The following criteria are suggested as a reasonable and fair treatment of such gifts in relationship to rate base accounting:

1. The full amount of such gifts be included in the rate base, and at a full rate of return, when all of the following considerations are met:

a) They are gifts of public funds.

b) The total amount of the gifts are allocated on a reasonable (not necessarily pro rata) basis to all facilities in the entire property being developed.

c) There is a competitive relationship between the particular port and other ports. In this situation the port benefited by the gift should not be permitted to exclude the return on the gift property to enable it to publish lesser rates.

2. Gifts should be excluded from the improved property portion of the rate base under the following conditions:

a) When there is no effective competition from other ports or from other modes of traffic.

Clearly in this latter circumstance all parties benefit sufficiently without a need for a return on investment for the port. The port is benefited directly by the recovery of depreciation and the local community is benefited by the attraction of industry and by the creation of jobs. The shipping public should likewise benefit from reduced rates as an incentive to early use of the facilities, without which the primary objective of the gifts cannot be realized.

It is reasonable to provide for a return on the current market value of land in both situations for the reasons which were previously stated.

Policies Adopted by CAPA

1. **The rate base**

The traditional rate base for CAPA members has been land at market value, improvements and equipment at depreciated historical (original) cost. Throughout this chapter, the discussion relative to reproduction cost applies only to real property improvements. CAPA has adopted a rate base of depreciated reproduction cost for such improvements, land and equipment remaining at the traditional practice.

2. **Depreciation expense**

Annual depreciation expense will be reflected in cost studies based upon original costs amortized on the straight-line method.

3. **Other issues**

In the absence of comment or objection on any other contents of this chapter, they are also presumed to be adopted as policy.

CHAPTER FIVE—THE RATE OF RETURN

Along with the rate base, the rate of return is very closely related. Together they become the most important and critical issues in cost studies for rate-making in the marine terminal industry (as in any other regulated public utility enterprise.) The rate of return by itself is meaningless; it must be related to the rate base. For example, assuming that 10% of the rate base is a proper rate, the dollar amount varies as the rate base itself varies.

	Rate Base	10% Return
Original cost	$1,000,000	$100,000
Depreciated original cost	800,000	80,000
Reproduction cost	1,500,000	150,000

As with the rate base, it is important to see what Edwards, Freas and the Commissions have said about the rate of return.

EDWARDS

"The return upon the investment is here interpreted as the cost of capital. It is the amount available for interest, dividends, and surplus.

'The rate should be sufficient to attract capital to the industry and should be similar to that for similar undertakings attended by corresponding risks and uncertainties. The requirements in this have been summed up by the U.S. Supreme Court as follows:

> 'The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. (Bluefield Waterworks and Improvement Company vs. Public Service Commission, 262 U.S. (79).)"

Among the factors that Edwards considered as supporting a high rate of return were the extreme hazards of the industry (as contrasted to other public utilities), vulnerability to labor troubles, and a change in the character of cargo from an emphasis on bulk cargo to general cargo.

The factors tending toward a low rate of return were favorable interest rates, a healthy competitive relationship of private terminals vs. public ports, a steady increase in traffic, ample capital being attracted to the industry.

Edwards concluded that a 7% return was reasonable on private terminal property, a 6% return on land and 6.5% on improvements of Port of Oakland owned property (used by Howard Terminal) and a 5.3% rate for City of Richmond property (used by Parr-Richmond Terminal Co.). The City of Richmond rate represented the average rate of interest on outstanding harbor improvement bonds.

These rates, as previously stated, were applied to current market value of land, and to original costs (undepreciated) of improvements and equipment. Both the rates and the rate base were accepted by the Public Utilities Commission of California.

At that time, income taxes were of far less significance than they are today, and Edwards was silent on the subject. There is little question that under today's tax structure, given all other related facts that he did consider, his rates of return would be interpreted as "after provision for income taxes."

FREAS

With reasoning basically similar to Edwards, Freas added a further dimension to rate of return considerations by extending it to public ports. Yet the 7% rate that he adopted was peculiarly geared to the private terminals.

His reasoning is more fully stated than Edwards' and is quoted intact.

"Since it is the end result and not the method by which it is attained that determines the propriety of a return on invested capital,[1] it is of small consequence whether the amount of the base is liberal and the rate of return scant, or whether the converse is true. It is highly important, however, that the two be properly related.

'We are concerned here with an industry that, although subject to regulation, is highly competitive. There is no requirement, either municipal, state or federal, prohibiting the operation of a wharf without a certificate of public convenience and necessity such as is prerequisite to the conduct of many public utility businesses. Moreover, competition is not confined to similar enterprises in the same area. Any major terminal on the Pacific Coast is a competitor of each of the terminals involved, and the business of all

[1] F.P.C. vs. Hope Natural Gas Co., 320 U.S. 591 (1944).

may be seriously affected by a shifting of tonnage between water and land carriers.

'Secondly, the busines is subject to fluctuations of serious import. Seasonal peaks and valleys, and those resulting from periods of prosperity and depression, are much more pronounced than is the case with many utilities.

'Thirdly, a major change in economic conditions may jeopardize an entire investment. To illustrate, some years ago most of these terminals enjoyed considerable revenue from coast-wise and inland waterway traffic. Due to changed economic conditions, the volume of that traffic is but a fraction of what it formerly was, and an appreciable increase is at least problematical. Such situations, while they have a forceful impact upon the wharfinger business, are completely beyond the operator's control. This is likewise true of important matters of public policy, such as the price set by the Government on vessels sold to ship operators. It is likewise true of labor disturbances which, though not involving the terminal, may suddenly terminate the shipping upon which the terminal is dependent.

'On the other hand, the terminals in question are, generally speaking, well established. There is good reason to believe that the postwar traffic will at least equal and in many instances exceed that of pre-war years. Half of the terminals, owned by political subdivisions, have the credit backing of the State or of important municipalities, and none seem to encounter any great difficulty in securing needed capital. Interest rates on invested capital and returns allowed other utilities have declined substantially.

'This study discloses a wide variation in wharfinger operating costs. This variation is narrowed if calculations assuming equal use of facilities are made. Even then it is substantial. On the experience of the fiscal year 1939-1940, rates reflecting costs, exclusive of any return on capital, would for several of the terminals at least be prohibitive.

Creatures of political subdivisions can and frequently do operate without provision for profit. It cannot be said, therefore, that a given rate of return is necessary to produce, in each of the ten instances under consideration, an end result in dollars necessary to 'assure confidence in the financial soundness of the utility and . . . adequate, under efficient and economical management, to maintain and support its credit and enable it to raise money necessary for the proper discharge of its public duties.[1]

'The developed costs for the privately-owned operations are generally less than those of the ones that are publicly-owned. It is considered proper, therefore, to determine the return for the former and to extend it to the latter. Since this study presupposes conditions obtaining in 1939 and 1940, interest rates prevailing in those years must be used. For the private operators it is believed that returns of seven percent on the rate basis determined as hereinbefore indicated would have produced amounts which would have been adequate and fair alike to the terminals and to the carriers and shipping public using their facilities. That percentage has therefore been used as the basis for the calculations in this study.' "

In adopting a 7% return, Freas applied this to a rate base of current market value of land, and generally depreciated original costs of structures and equipment (although some reproduction costs were included).

THE FMC ATTITUDE

The Commission has never prescribed a rate of return for general rates of a marine terminal. In Docket 640 it said that public ports, as well as private terminals, are entitled to a fair rate of return. And in Docket 66-48 it neither agreed nor disagreed with the examiner's conclu-

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[1]Bluefield Waterworks and Improvement Company vs. Public Service Commission, 262 U.S. 679.

sion that with respect to grain terminals, a reasonable rate of return would be 10% after income taxes on a rate base of original cost of land and depreciated original cost of improvements and equipment. (This conclusion, incidentally, resulted in an increase in total costs of $700,000 from a base of approximately $10,000,000 over the respondents' rate base of market value of land, reproduction cost of improvements and equipment, and a 5% return after taxes).

Though not prescribing a rate of return, the Commission has approved rate levels in a number of terminal lease or preferential assignment cases in the range of 7 and 8% on a rate base of current values of land and undepreciated original cost of improvements.

CURRENT CONSIDERATIONS AND CONCLUSIONS

All of the considerations that supported a rate of return at a higher level than those generally prevailing for public utilities at the time of the Edwards and Freas studies are present today. Very few of the factors that led to a low rate of return are present today, such as low interest rates, stable construction costs, capital availability, etc.

Since the early studies, a considerable evolution has occurred, characterized by the following major events:

1. Water carriers have introduced vast changes, not only in the configuration of vessels, but in related cargo handling methods.
2. Capital demands have been severely taxed, both by carriers and by ports.
3. As capital has continued to replace labor in the industry, the private terminal has either been forced out of business or has found more attractive uses for its capital.
4. Costs have continued to spiral.
5. Interest rates have also spiraled.

6. Increasing volumes of containerized cargo have led to steady declines of break bulk cargo (for which most California terminals were originally built).

7. The decline of break bulk cargo has seriously affected the revenues of ports dependent upon them, even to the point that they are hard-pressed to meet the minimum revenue requirements to support revenue bond issues.

8. Competition has become an ever-increasing problem, not only limited to California ports competing with each other and with Pacific Northwest ports, but with other regions as well.

With all of the dramatic changes in the physical characteristics of the industry, it is imperative that the financial considerations keep pace. By establishing market values of land, and depreciated reproduction costs as the rate base, some of the financial ills may be corrected. At least at the point of the rate structures, a basis of equality and uniformity will be provided.

The remaining part of the equation, then, is the rate of return. It must be sufficient to provide for the cost of presently required capital. This could be accomplished by using a weighted average of the interest requirements in this Association for outstanding bonded debt. Beyond this, a 2% rate of return should be adequate. The policy adopted by CAPA, in our opinion, is reasonable and will achieve generally consistent end results.

Policy Adopted by CAPA

The rate of return on the rate base adopted in the previous chapter will be the municipal bond index based on the first publication after January 1st for the year under study, plus 2½% rounded off to the nearest 1/10 of 1%.

This index, for the first week of January, 1974 (Bond Buyer's Index of 20 Municipal Bonds), was 5.18. Thus, the

rate of return for a study for the fiscal year ending June 30, 1974, would be 5.2% (rounding), plus 2.5%, or a total of 7.7%.

CHAPTER SIX—OVERHEAD EXPENSES

"Overhead expense" is a much-maligned and over-worked term. It has no real accounting significance unless it is appropriately classified and defined. In the marine terminal industry it is predominantly a fixed or constant cost, as distinct from a variable or incremental cost that fluctuates in relationship to volume. As a matter of fact, this is generally true for all of the costs of the industry; they are related to plant and equipment rather than to operating labor and expenses. Even at operating terminals capital costs are substantially greater than labor costs.

The following classifications and definitions of overhead are appropriate for the industry.

1. Plant overhead, including related equipment.

   Those costs necessary to hold, maintain and protect property devoted to public use. They would include the following:

   Maintenance
   Insurance
   Property taxes (or possessory interest)
   Watchmen (as related to fire protection)
   Dredging
   Waterway clean-up
   Terminal clean-up
   Fire boat expenses

2. Operating overhead

Operating overhead as a general term has a different meaning for the operating port than it does for the non-operating port. The operating port incurs considerable direct cost related to the labor and equipment necessary

to perform the many activities characterized broadly as Accessorial Services in this study. Beyond these direct costs the operating port incurs costs of an indirect nature in more or less comparable circumstances to the non-operating port.

With this prelude, operating overhead as a common concept for all ports can be defined as follows:

> Operating overhead includes those expenses incurred on terminal property which are not included in plant overhead, and which are not directly related to the labor and equipment involved in providing Accessorial Services.
>
> It would include the following:
>
> Superintendence (or wharfingers)
>
> Watchmen (to the extent that it relates to operating labor)
>
> Utilities (net of utility sales)
>
> Unclassified other expenses

3. Administrative overhead

This classification would include all expenses of the general office, including executive, sales, traffic, legal, accounting, communications, etc. It should also include depreciation on non-revenue structures and equipment that contribute to the marine terminal activities such as general offices, shops, automotive equipment and office furnishings and equipment.

The Freas Formula provided for a return on the investment in such items, as well as on working capital. The amount of return is not significant in relationship to total costs and would have no appreciable influence on the end results. In the interest of simplicity no provision is made for return on those items in the cost study.

APPORTIONMENT

Having defined the three categories of overhead, it becomes necessary to determine the amounts that are attributable to the marine terminal operations as a whole, and to further apportion them to the facilities and services included in the study.

Plant overhead presents no real problem as in most instances all ports record these items on a location basis. Where items are not so recorded, as in the case of insurance and taxes, they may be allocated conveniently on a value or area basis. Maintenance costs should include prorated expenses of the Maintenance Department, and to some extent the Engineering Department. It should be recognized that maintenance fluctuates considerably from year to year and that the incurred expense of any given year may reflect these fluctuations. Maintenance dredging, substructure and transit shed maintenance should thus be determined over at least a five year average and the actual costs adjusted to current indices.

Operating overhead generally is not recorded separately by location and must be apportioned on a reasonable basis. What is reasonable differs for the operating and the non-operating port. The operating port must recognize that operating overhead relates to Accessorial Services as well as to the charges for the use of facilities. There is no common, measurable basis of underlying cost to determine the precise amount to apportion to Accessorial Services. Each operating port should examine the overhead items involved and apportion in accordance with the best judgment of management and port policy. Port policy varies on watchmen hire, for example. Some ports hire watchmen solely for fire protection, in which event the cost would be a plant overhead. Others need additional watchmen to protect cargo from pilfering. In such circumstances a substantial amount should be charged to Accessorial Services. Non-

operating ports, and operating ports (after subtracting the amount apportioned to Accessorial Services) should allocate to separate facilities on a basis of the respective total investment in plant.

Administrative overhead need be measured in two broad steps:

1. By major profit center.
2. By locations within major profit center.

Public ports are engaged in widely divergent revenue-producing activities. They may include an airport, industrial development, concessions and rents, and other activities besides marine terminals. It is their responsibility to insure that each major revenue-producing activity bear a fair share of administrative overhead. No precise formula can be applied that will be equitable for all ports and all users, as the revenue-producing configuration has many variables among ports. It is a management responsibility of the individual port to adopt a method which is fair in the particular circumstances.

CHAPTER SEVEN—THE COST FORMULA

SCHEDULE I

Certain basic guidelines have been followed in developing the cost formula, as follows:

1. To develop a uniform method of measuring and allocating costs for all members for the common services of Dockage, Wharfage, Wharf Demurrage and Storage at facilities provided to the public on a published tariff basis.

2. To provide a flexible formula that will enable particular members to determine the costs of Special Facilities and the costs of Accessorial Services.

3. To adhere to the extent possible to cost allocation principles already established in the Freas For-

mula and approved by the Federal Maritime Commission.

4. To simplify procedures to the maximum extent, the goal being reasonableness of costs rather than precise scientific accuracy.

The formula consists of four basic schedules. They are illustrated in blank form in Appendix A. The four schedules are briefly described as follows:

Schedule I—Plant Costs

Schedule II—Wharfinger Costs and Allocations

Schedule III—Special Facilities

Schedule IV—Accessorial Services

Where a blank space appears in a particular column of these schedules, an amount should be entered; where there is a X, no amount will be entered.

Schedule I—Plant Costs is explained in the remainder of this chapter. Succeeding chapters explain Schedule II-IV. Schedule I is intended to be developed separately for each of the five classes of facilities which are included in this study. Additional Schedules I may be prepared as the need and interest are of importance to a particular member. This approach is a departure from the Freas method wherein all terminal facilities were included in one Schedule I. The new approach is preferable for the following reasons:

1. Much material that was reflected originally in supporting work sheets appears clearly in the formula itself.

2. Costs by major types of facilities are more apparent, thus being easily extracted for special analysis.

Columns (a) thru (c) are provided in the schedule to identify respectively the account title or description, its base of distribution, and the total cost to be distributed. Columns (d) thru (h) provide for the basic distribution

to vessel and to cargo, and various other uses. Space Rentals, Column (f) relates to offices, corrals, gear space, etc. which produce a rental revenue, the costs of which are included in the facility costs. Column (g) crane rental is provided to accumulate the costs of cranes that are an integral part of some general cargo facilities. Non-wharfinger, Column (h) provides for the accumulation of costs, which although a part of various terminal facilities, have no bearing on wharfinger operations.

The various bases of distribution are as follows:

Basis

1. 100% vessel

2. 100% cargo

3. 50-50 vessel and cargo

4. PRIMARY—cargo, space rentals, and non-wharfinger in square foot ratio

   SECONDARY—30% of the total cargo amount in primary distribution, represents aisle space. Allocate 40% of this to vessel. Remaining cost is for cargo.

5. 100% non-wharfinger

6. On basis of total structure costs (Line 18)

7. To crane rental equal to revenue therefrom—balance 50-50 vessel and cargo.

Account description in general

As noted previously, the preponderance of costs of a marine terminal operation relates to plant and equipment. In the absence of any similarity of account classification among members of the Association, account description for cost formula purposes is difficult. Cost study for rate-making purposes presents added dimensions due to the concept of return on investment as a "cost". The industry historically has adhered in the main to the principle of "fully

distributed costs" which simply means the inclusion and distribution of all costs providing the service including costs of operation, maintenance, and administration, as well as providing for a return on the investment through depreciation charges and a return on the investment, whether provided by debt or equity capital.

Schedule I of the cost formula thus becomes the most critical portion of this work. The accounts have been provided in sufficient detail to eliminate duplication in supporting workpapers and to facilitate the distribution process. For example, Return on Land is provided on nine lines, each item of which is in most cases allocated directly to the vessel or to the cargo, or 50-50 to each. The Freas Formula showed Return on Land on one line, requiring considerable supporting working papers for distribution purposes. Likewise the Freas Formula showed Return on Structures on one line, also requiring voluminous supporting working papers. Depreciation and maintenance of structures were shown on several descriptive lines in the Freas Formula.

The approach herein is to accumulate all structure costs including return, depreciation, maintenance, insurance and taxes by structural category as shown on Lines 10 to 17. This way five items of costs which are distributed on the same basis may be distributed as one. Appropriate work sheets are necessary to accumulate the five cost items, but this can be done with less effort than that exerted in previous formulae.

Lines 19 and 20 provide for costs of construction, maintenance and fire equipment, a procedure also employed in the Freas Formula. Under the concept of overhead expense described in the previous chapter, provision is also made in Lines 20 to 23 for plant related overhead of fireboat operation, watchmen for fire protection and clean up expenses. Crane costs is included as a new requirement not

prevalent during the Freas study. The equipment items on Lines 19-24 should include return on investment, depreciation and maintenance.

LAND AND WATERWAY VALUE AND RETURN

The total value of land is the product of multiplying the total surface land (between fender lines and rear and side boundaries of terminals) by a weighted average value per square foot. The amount attributable to the waterway is artificially derived. Although waterways are rarely owned by ports, the riparian rights to their use is the most compelling factor that makes the entire terminal lands valuable. Under the Freas approach, the normal area of waterway required to accommodate oceangoing vessels was an area 75′ wide extending the length of the berthing area. Today's ships require 100′ in the consensus opinion of Association members. For purposes of allocating Return on Land, the following hypothetical example is given:

Area of Land (other than waterway)	1,000,000 sq. ft.
Value per sq. ft. (weighted average)	$2.00
Total value	$2,000,000
Rate of return	8%
Amount of return	$160,000
Distributable area	
1,000,000 sq. ft. surface land	
100,000 sq. ft. waterway	
1,100,000 sq. ft. total	
Return per sq. ft.	$.14545

The area of each of the components of the terminal is multiplied by the return per square foot to determine the total return to be inserted on Lines 1 to 9 of Column (c). They are then distributed to Columns (d) thru (h) on the bases of distribution referred to by symbol in Column (b).

The test cost studies using a uniform 100′ width for waterway indicated that certain types of facilities may reflect a disproportionate ratio of waterway to surface land.

Bulk oil facilities (except super tanker terminals) are a good example. This problem should be re-considered in future studies. It would probably be more realistic to determine the waterway requirements for each type of facility, rather than using a 100′ width for all facilities.

It is unlikely, however, that this re-consideration would affect general cargo facilities. Thus, the conclusions of this study are valid insofar as they relate to a comparison of the FREAS and CAPA formulas.

COMMENTS ON THE BASES OF DISTRIBUTION

The bases were cited previously, but the following comments are made to explain them more fully. Basis I provides for the allocation of all waterway costs to the vessel. This is consistent with the Freas treatment and with the underlying principle of allocating cost in accordance with the use by vessel or cargo. The waterway is used solely by the vessel.

Basis 2 is used for those instances where a cost is for the sole benefit of the cargo. Rail tracks and roadways fall into this category. Their primary purpose is for ingress and egress of cargo via land carrier. A secondary use of roadways relates to auto passenger traffic by various personnel doing business at the terminal. This use is of such minor consequence as to be insignificant. The treatment adopted here is also consistent with Freas.

Basis 3 provides for a 50-50 allocation between vessel and cargo. It is used for distributing apron wharf at general cargo break bulk and combination terminals and for open wharf at bulk terminals and container terminals. This treatment departs somewhat from the Freas treatment for reasons of simplicity and also due to changed circumstances as follows:

1. **Apron wharf at break-bulk and combination break-bulk container terminals.** Apron wharf, for this

purpose, represents that portion of the wharf substructure comprising an area extending the entire length of the berth and between the fender line and the outward wall of the transit shed. Freas also allocated the apron wharf equally between vessel and cargo where there were no rail tracks on the apron. Most terminals at that time were equipped with rail tracks on the apron, as there were frequent cargo movements directly to and from the vessel and a flat or gondola rail car. He found that the cost of construction of aprons with rail tracks was 40% greater due to the tracks. In keeping with the principle that all rail tracks were for the sole benefit of the cargo, he thus allocated the rail portion of apron wharf costs directly to the cargo, and the remainder equally to vessel and cargo.

Direct movement today is so minimal that in most instances the rail tracks are obsolete. It would be manifestly unfair to burden the cargo alone with costs no longer devoted to its sole use. The equal distribution to vessel and cargo is an appropriate method of treating a joint cost where the precise benefit or use by either is impossible to measure.

2. **Open wharves at bulk and container facilities**

Open wharves are loosely defined as those which have no transit sheds or other covered structures for the accommodation of cargo. In the main they consist of bulk oil, dry bulk, container, lumber, and grain wharves. With the exception of grain, where in Docket 66-48 the Federal Maritime Commission approved the concept of the entire wharf being the responsibility of the vessel, the costs of the apron portion of such wharves are allocated on Basis 3, or equally to vessel and cargo.

Such wharves are clearly of benefit to both vessel and cargo. They are of benefit to the vessel in provid-

ing berthing facilities, support structures for flow of cargo to and from the vessel, ingress and egress of vessel personnel and various contractors, etc. They are of benefit to the cargo by their proximity to cargo storage areas (frequently owned by cargo interests), support structures for conveyance systems, etc. The precise degree of benefit to each is indeterminate, and it is reasonable to treat them equally.

The main problem herein is to define the open wharf investment, particularly where it is adjacent to a storage area. The definition problem varies by type of wharf. The following guidelines should be followed.

(a) Bulk liquid oil wharves—there is usually no problem, as such wharves are normally separate and distinct structures from the storage facilities.

(b) Bulk dry and lumber wharves—some of these are similar to bulk liquid wharves and are separate structures. Where they are not separate structures, they must be studied carefully to segregate the wharf use and the storage use. Engineering and operating personnel must be consulted to properly resolve these problems.

(c) Container wharves—considerable paved land areas are contiguous to the wharf at container terminals. The width of the tracts on which the cranes are constructed may be a reliable indicator, or in other areas the storage area is clearly marked and even striped for parking purposes. As a general rule, the area of wharf would be that area traversed by the cranes.

Basis 4 applies to the distribution of transit sheds and open cargo areas. These are the facilities devoted to the accommodation of intransit cargo on free time, and for Wharf Demurrage and Storage beyond free time. The Freas Formula provided that an allocation of these costs

be made first to Wharf Demurrage and Storage on a basis of the percentage of space required for such purposes. Unfortunately the ports do not maintain adequate records to support such calculations and, in the case of non-operating ports, do not have sufficient documentary records to do so. As a practical measure, though unreliable, they have estimated this usually by reference to relative revenues from Demurrage and Storage compared to Wharfage. These estimates have not been made other than on an annual basis which makes them even more unreliable.

Rate structures for Demurrage and Storage are provided in at least three dimensions for all ports, with a fourth dimension at operating ports. Rates are provided in cents per ton generally as follows:

Wharf Demurrage—daily rates for each day beyond free time

Wharf Storage —granted by the port authority only when requested

(a) Daily rates

(b) Monthly rates

Storage Receiving and Delivery—at operating terminals, when it is necessary to move the cargo to or from an intransit area and a storage area, an additional charge per ton.

The proper treatment of Demurrage and Storage was discussed in depth with the Economic and Finance Committee. It was agreed that such charges are generally in the nature of a penalty with the main objective being that of freeing cargo areas for intransit cargo. It was also agreed that it was impracticable to attempt to develop cost for the space use, and that cost was not of primary significance in establishing these rates.

Accordingly, the formula does not provide for a cost allocation of cargo areas to Demurrage and Storage. but de-

ducts their revenues from total cargo area costs. The remaining cargo area costs, after this deduction, are recoverable from Wharfage. At any period of cost study where Demurrage and Storage revenues exceed 20% of Wharfage revenues, the above treatment should be re-considered.

Although the Committee briefly discussed the Receiving and Delivery charges, no recommendation was made. This charge only applies at operating terminals and it is readily supported on a cost basis as the prime costs are labor and cargo handling equipment. Like other such activities, this is an Accessorial Service and should be treated as such in the cost formula as applied to operating terminals.

Continuing with Basis 4, transit sheds and open cargo areas are basically used for the accommodation of cargo (either on free time or on Demurrage or Storage), rental of specific areas and occasionally for non-wharfinger purposes (passenger facilities should be treated as non-wharfinger). A primary distribution should thus be made to these separate functions, on the basis of the percentage of total area used by each.

A secondary distribution should then be made of the cargo space costs. Cargo space requires aisles for ingress and egress, fire protection, etc. The Freas study found that aisle space represented generally 30% of total cargo space. Replies to questionnaires in this study indicate no need for departure from the 30% factor. The Freas Formula allocated 25% of aisle space to the vessel and 75% to the cargo. Modern conditions indicate a greater degree of use of the aisles by the vessel as the emphasis at marine terminals has been to speed the turn-around time of the vessels. We concur with the Committee that a more reasonable allocation of aisle space would be 40% to the vessel and 60% to the cargo.

Basis 6 is used for the distribution of miscellaneous equipment and services shown in Lines 19-22 of Schedule 1.

Basis 7 relates to cranes, another investment found at a number of recently constructed facilities, but not present during the Freas studies. These installations represent substantial investments by the port industry. They are of value to cargo particularly in hinterland areas, as in their absence considerable land carrier costs would be incurred to move cargo to metropolitan ports, where there is a wide choice of cargo handling equipment. They are of obvious value to the vessel as they contribute directly to the stevedoring operations.

It is unlikely that there will be sufficient use, however, to produce rental revenues to adequately compensate the port. After discussion with the Committee, it was agreed that the excess cost of crane installations over the rental derived therefrom was of equal benefit to the vessel and the cargo and should be so treated in the cost formula.

SCHEDULE IA—Cargo costs, combination break-bulk and container terminals

Schedule I is designed so that its entire contents can be transferred readily to Schedule II. This goal is achieved in all instances except that of the combination break-bulk and container terminal. Schedule IA is established for the purpose of distributing the plant costs between break-bulk and container cargo at such terminals.

Costs should be so allocated that the break-bulk and the container cargo are treated insofar as possible at combination facilities as they would be treated at separate facilities. On this principle we find that there are transit sheds and rail tracks at both break-bulk terminals and at combination terminals, but there are none at container terminals. These costs should thus be distributed directly to break-bulk.

All other apparent features of combination terminals are common to either break-bulk or container terminals, al-

though certain features may vary by degree. Open cargo areas may be separately laid out for containers and break-bulk, for example, in which case the costs may be directly segregated. In the absence of evidential support for direct allocations by use, a reasonable method for allocating the balance of costs of land and structures would be the revenue tons of Wharfage cargo.

CHAPTER EIGHT—THE COST FORMULA

SCHEDULE II

WHARFINGER COSTS AND ALLOCATIONS

Schedule II provides for the distribution of costs to the revenue producing classifications.

The first step is to bring forward the plant costs from Schedule I and Schedule IA. The first seven lines of Schedule II are used for this purpose. The total costs in Column (c) of Schedule I are inserted in Column (c) of Schedule II, a separate line in Schedule II being used for each of the various separate categories of Schedule I. The total cost brought forward, however, should be reduced by the non-wharfinger costs, Column (h) of Schedule I, as there is no need for further analysis of them.

No distribution bases are necessary for the plant costs in Schedule II, as all of the necessary analysis was done in Schedule I. The following process is all that is required.

1. Vessel cost, Column (d) Schedule I is posted to Dockage, Column (d) Schedule II. No breakdown of Dockage cost by vessel type is necessary, as Dockage rates are applied on the length of vessels without regard to type of cargo carried.

2. The cargo costs, Column (e) of Schedules I and IA, were separately developed by terminal classification. These are the costs to be assessed against Wharfage. Columns (e) through (i) of Schedule II are provided for this purpose.

For example, the cargo cost for break-bulk, Schedule I, Column (e) are transferred to Line 1, Column (e) of Schedule II. Cargo costs for Columns (e) and (f) for the combination break-bulk container terminals are found in Schedule IA and should be inserted on Line 2, of Schedule II, Columns (e) and (f).

3. Space rental costs, Column (f) of Schedule I, and crane rental costs, Column (g) of Schedule I, are posted to Columns (j) and (m), respectively, Schedule II.

Operating Expenses

Basis 8 is used for distributing certain operating expenses. Items on Lines 9 through 11 are common to all ports. They all require superintendence, utilities and more or less other terminal expenses not significant enough to classify separately. These items have some affect on all of the revenue producing activities and should be spread on as wide a basis as possible. Such a basis for non-operating terminals is the underlying plant costs, the totals of which appear on Line 8 of Schedule II.

For operating terminals, these overheads relate to labor activities as well as plant costs. A reasonable treatment would be to distribute 50% on the basis of plant costs and 50% on the basis of direct labor appearing on Line 12.

Expenses appearing on Lines 12 to 17 are incurred only at operating terminals and relate solely to Accessorial Services. They are accordingly distributed directly to Column (k), and will be discussed in more detail in Chapter X.

Administrative expenses

Basis 9 is used for distributing administrative expenses. At non-operating ports, they may be distributed reasonably on a basis of the sum of the underlying plant and operating costs. Every effort should be made, however, to

recognize special situations requiring more or less weight. For example, Special Facilities may represent mainly lease revenue rather than tariff revenue. Less detailed administrative and control processes are required for lease facilities.

The problem of allocating administrative expenses at operating ports is more complicated. Additional overhead expenses are incurred relating to the operational functions involving warehouse and clerk labor and operating equipment. The problem is to determine the amount of administrative expense related to revenues for use of terminal facilities on the one hand and the amount related to operations on the other hand. A review of Freas Formula studies for the 1966-1967 fiscal year provides a solution based upon experience. From those studies, we find the following average relationship of wharfinger administrative expenses to plant costs:

Operating ports	25%
Non-operating ports	18%

Thus the operating ports incur administrative expense of 7% of plant costs greater than non-operating ports. In the current study, it is recommended that 5% of plant costs (Line 8) be calculated and applied directly to Accessorial Services, Column (k). The remaining balance of administrative expense, being comparable in principle to that of the non-operating ports, may be allocated on the basis of plant costs, Line 8. The 7% was reduced to 5% for the above purpose as the plant costs used currently are at a higher level than those on which the 7% was based.

CHAPTER NINE—THE COST FORMULA

SCHEDULE III—SPECIAL FACILITIES

All ports have a wide range of special facilities. Such facilities may be considered "special" for a number of reasons, including the following:

1. Although it is a wharfinger facility being used as such, it does not fall within the five types of facilities of common interest to the Association.

2. Although it is a wharfinger facility, it is not being used as such, for example, a pier being rented as a ship supply or repair base.

3. It is a wharfinger facility provided to the public on other than a published tariff basis, such as straight lease, mini-max lease, preferential assignment, etc.

The responsibility assumed in this study does not embrace a cost formula to determine the compensatoriness of leased facilities on a common basis. It does require, however, that those ports desirous of measuring their costs at such facilities for their internal purposes have a convenient point of departure. It further requires that overhead costs of the entire port and the marine terminal department as a whole be fairly considered. Ideally those overheads determined in this study to be fairly allocable to Special Facilities should be considered equally fair when considering the revenue needs of those facilities.

Schedule III of the cost formula, therefore, commences by transferring the Special Facilities costs in Column (1) of Schedule II to Column (c) of Schedule III.

Further details of columnar distribution of Schedule III are not of common interest, nor are the solutions commonly possible. They require treatment on a local basis, but the distribution should follow the general principles established elsewhere in this study.

CHAPTER TEN—THE COST FORMULA

SCHEDULE IV—ACCESSORIAL SERVICES

This schedule applies only to the operating ports. The Accessorial Services shown in Column (k) of Schedule II are transferred to Column (c) of Schedule IV. Columns

should be provided in Schedule IV for as many of these services as are desired by the operating member concerned. A minimum columnar distribution would include the following:

Service charges

Rail car loading and unloading

Truck loading and unloading

Line handling

Miscellaneous charges (Man Hour Rates)

Storage receiving and delivering

Other services (detailed as necessary)

It should be observed at this point that Accessorial Services do not include any plant costs. This cannot be so when costs at operating ports for the basic charges of Dockage and Wharfage are to be uniformly developed. This in itself is not a departure from the Freas Formula, as very minor (other wharfinger) plant costs were allocated to Accessorial Services.

In rate-making, however, tariffs of operating ports may include rates called "Service and Facility Charges". These rates traditionally were based upon costs that included plant costs attributable to the vessel that were not recovered by Dockage rates. No need for revision of Service Charges downward is necessary, unless the Dockage revenues of operating ports increase to the point that the combined Dockage and Service Charge revenues significantly exceed the combined costs. An amendment of the tariff definition may be in order, however.

Operating ports frequently classify direct and indirect labor and other direct and indirect costs in considerable refinement. Whenever this practice is followed Schedule IV may be more meangingful if they substitute such refinements for the four lines used therefor in the schedule.

Direct labor, for example, may be refined into cargo handling labor and clerical labor. The objective is the ultimate distribution, and individual flexibility is preferable to rigid uniformity of terms.

Although no provision was made for operating equipment in Schedule I (because non-operating ports have none), some ports may have items of equipment that are actually a part of the plant, such as the car lifts at Sacramento. These items should have been included when developing costs for Schedule II, Line 17. Costs of operating equipment should include return on investment, depreciation, maintenance, etc. For this purpose, depreciated original costs as a rate base, and straight-line depreciation, should be reasonable and at least it is simple.

Every effort should be made to distribute costs of Schedule IV directly whenever possible. For example, other indirect labor may include clerical staff of the dock office, some of whom may be directly involved in the "car department", "demurrage department", etc.

Operating overhead generally may be distributed on a direct labor basis, and administrative expense on a basis of the total operating costs, Line 18.

CHAPTER ELEVEN

EVALUATION OF COST STUDIES, POLICY MATTERS AND CONCLUDING REMARKS

This chapter of the preliminary report was entitled "Evaluation of Results". It contained various recommendations and guidelines for cost studies to test the CAPA formula. The test studies have been completed and the chapter is re-written to include our evaluation of the cost studies along with comments on certain policies adopted by the Association and our general conclusions.

EVALUATION OF COST STUDIES

Chapter III identified seven members who participated in the cost studies. The studies were made for the fiscal year ended June 30, 1971, and included rate bases and rates of return as follows:

Rate Base	Rates of Return (%)
A. Land at current market value, improvements and equipment at depreciated historical cost	0-5-10
B. Land at current market value, improvements at depreciated reproduction cost, equipment at depreciated historical cost	0-5-10

We consulted in the conduct of these studies and reviewed the working papers to satisfy ourselves that the CAPA formula had been applied properly.

Freas Formula studies were made without our assistance for the same fiscal year. These studies were based upon Rate Base A above, and were limited to break-bulk facilities provided on a published tariff basis.

The cost studies support the following conclusions:

1. The CAPA cost formula, as compared to the Freas Formula, results in a 3% shift of the combined total Dockage and Wharfage cost from cargo to vessel at break-bulk facilities.

Basis for this conclusion:

Using the Freas Formula rate base (Rate Base A above), at a 5% rate of return, both the Freas and CAPA Formula were applied. The composite results for all of the members studied are as follows:

	Dockage Cost	Wharfage Cost	Total Dockage and Wharfage
CAPA Formula	$5,624,269	$14,686,293	$20,310,562
Freas Formula	4,956,352	15,189,707	20,146,059
CAPA Over (Under)	$ 667,917	$ (503,414)	$ 164,503

The figures demonstrate that the Dockage increase of $667,917 and the Wharfage decrease of $503,414 are ap-

proximately 3% of the total Dockage and Wharfage cost of $20,146,059.

The difference of $164,503 in the total costs of the two studies was caused by minor inconsistencies at certain ports in applying the Freas Formula. We reviewed the Freas studies sufficiently to identify and adjust for any significant inconsistencies. The difference is less than 1% of total costs and should not affect the conclusion stated above.

2. The use of the depreciated reproduction cost rate base for improvements (Rate Base B above) in lieu of the depreciated historical cost (Rate Base A above) increases total costs (including a 5% return on investment) by 31.3%.

Basis for this conclusion:

The composite total costs for the members included in the CAPA cost studies were as follows:

Rate Base B (Reproduction)	$44,510,893
Rate Base A (Historical)	33,805,094
Excess of B over A	$10,605,769
% Excess	31.3%

3. A rate of return of 5.5% on Rate Base B (including improvements at depreciated reproduction cost) provides the equivalent dollar amount as a rate of return of 10% on Rate Base A (including improvements at depreciated historical cost).

Basis for this conclusion:

The following composite amounts for members included in the CAPA cost studies show the total investment at Rate Bases A and B, and the returns on these investments at rates of 5% and 10%.

	Rate Base A (Historical Cost)	Rate Base B (Reproduction Cost)
Total Investment	$254,159,240	$464,094,695
Return at 5%	12,707,962	23,204,735
Return at 10%	25,415,924	46,409,470

The 10% return on the historical cost investment of $254,159,240 amounts to $25,415,924. The same dollar amount of $25,415,924, expressed as a percentage of the $464,094,695 reproduction cost investment produces a rate of return of 5.5%.

POLICY MATTERS

At the conclusion of the cost studies, certain matters requiring policy decisions of the Association were reported to the Economic and Finance Committee in our letter of February 1, 1974. These were considered by the Advisory Committee on March 7, 1974, and decided by the Association in its meeting on March 8, 1974. Certain of these decisions relate to matters covered in the preceding chapters and have accordingly been given full consideration as each matter arose, or at the conclusion of the chapter.

The following policies relate more to the ultimate use of the formula at it relates to the determination of revenue requirements, which subject is not specifically dealt with in the report (Policy citations below are from the CAPA minutes of March 8, 1974).

"That for the purpose of a composite study, that it include only those facilities that are charged to Dockage, Wharfage, Wharf Storage and Demurrage, which charges are assessed on a tariff basis."

The above statement of policy is meant to clarify portions of Chapter Three—Scope of Present Study. In that chapter it was observed that certain Association members are operating ports, also that certain members provide facilities on other than a published tariff basis. The CAPA Formula is designed to permit the development of costs for such activities ***for the individual use of the member concerned.***

"That it be the policy of CAPA that it continue to combine the various types of cargo containerized and break-bulk

under one column rather than separate rate commodity columns."

This statement is concerned with how the cost study is used, rather than how it is compiled. The cost formula is actually constructed to allocate costs between vessel and cargo, as used by each at five distinct types of terminals. The policy clarification relates specifically to the traditional practice of the Association with respect to Wharfage on general cargo, where the revenue requirements are determined by comparing the revenues and costs of all general cargo facilities, and not by separate presentation by type of terminal or packaging.

"That the formula include the actual rate of return."

Chapter Eleven, Page 61 of the preliminary report included the following. "Some port managements are also interested in knowing their actual rate of return, as well as their relationship to standard. By reference to the supporting work sheets, the return on investment can be determined, as well as its distribution. These amounts may be deducted from costs to arrive at costs exclusive of return, or out-of-pocket costs plus depreciation. The difference between these costs and related revenues would represent gain or loss before return on investment (including interest). These gains and losses expressed as percentages of the investment itself would represent the actual percentage of return."

We believe the above treatment meets the requirements of the Association.

CONCLUSIONS

The CAPA Formula has been given deeper consideration by this Association than any of its predecessors. It reflects the combined experience of the members of the Economic and Finance Committee, which included accountants, engineers and traffic experts.

It observes the basic principles of cost allocation between vessel and cargo users that were established by its predecessors and approved by the Federal Maritime Commission.

The rate base philosophy is unchanged from traditional practices of the industry with respect to the investment in land and equipment. The base changes only with respect to the investment in land improvements. The need for this change equates simply to the demands of the economic environment and the uniformity of cost measurement that are vital to the financial stability of the port industry.

Lest the higher rate base create an uncontrollable inflation, a rate of return has been adopted by the Association that produces a dollar return nearly equivalent to a justifiable higher rate on a lower base. Other forces ultimately determine the level of rates to be charged by a port or an association of ports. The most prominent force is competition.

The CAPA Formula, its rate base and rate of return, for practical purposes, may result in a determination of revenue requirements on a maximum justifiable level. It is most unlikely, however, that such a level will ever be attained, even as under the Edwards and Freas philosophies the levels prescribed were never attained. The formula provides an enlightened approach to cost measurement, not a mandate that rates will be established with costs as the sole criteria.

Port rates are established ultimately in the discretion of port management. Where it is deemed desirable for the CAPA to have uniform rates, they are established only after a study of the revenues and costs and with forum discussions by the Traffic Committee and the Advisory Committee. All of the influences on rate-making are eventually considered before the final decisions are made.

We believe that the CAPA Formula provides a reliable basis for accumulating the cost data as the basic point of departure for the rate-making process.

SCHEDULE I—PLANT COSTS

a) General cargo, break-bulk
b) General cargo, container
c) General cargo, combination

d) Dry bulk
e) Liquid bulk
f) Special facilities

Line No.	Account Description (a)	Distribution Base (b)	Total Cost (c)	Distribution of Costs: Vessel (d)	Cargo (e)	Space Rentals (f)	Crane Rentals (g)	Non-Wharfinger (h)
	Return on land							
1	Waterway	1			x	x	x	x
2	Apron wharf (or open wharf at bulk and container facilities)	3				x	x	x
3	Transit shed	4					x	
4	Open transit area	4					x	
5	Rail tracks	2		x		x	x	
6	Roadways	2		x		x	x	
7	Other wharfinger	3				x	x	x
8	Non-wharfinger	5		x	x	x	x	
9	Sub-total							

Line No.	Account Description	Distribution Base	Total Cost	Distribution of Costs				
				Vessel	Cargo	Space Rentals	Crane Rentals	Non-Wharfinger
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
	Structures (return, depreciation, insurance, maintenance, taxes)							
10	Apron wharf (or open wharf at bulk facilities)	3				x	x	x
11	Transit shed—substructures	4					x	
12	Transit shed—superstructures	4					x	
13	Open transit areas	4					x	
14	Rail tracks	2		x		x	x	
15	Roadways	2		x		x	x	
16	Other wharfinger	3				x	x	x
17	Non-wharfinger	5		x	x	x	x	
18	Sub-total							
	% total							
	Miscellaneous equipment and services							
19	Construction and maintenance	6						x
20	Fire equipment and fireboats	6						x
21	Watchmen (fire protection)	6						x
22	Cleanup—terminals	6						x
23	Waterway costs (dredging, cleaning)	1			x	x	x	x
24	Crane costs	7				x		x
25	Total plant costs							

SCHEDULE IA—CARGO COSTS
COMBINATION BREAK-BULK AND CONTAINER

	Distribution Base (a)	Total Costs (b)	Break-bulk (c)	Containers (d)
Direct to break-bulk				
Transit shed—				
land				
structures				
Rail tracks—				
land				
structures				
Allocated on basis of revenue tons				
Land return balance				
Structures balance				
Sub-total				
% sub-total				
Remainder allocated on % above				
Total to Schedule II				

SCHEDULE II—WHARFINGER COSTS AND ALLOCATIONS

Line No.	Account Description (a)	Distribution Base (b)	To[illegible] Co[illegible] (c)	Distribution of Costs: Dockage (d)	Wharfage: Break-bulk (e)	Wharfage: Combination Container (f)	Wharfage: Container (g)	Wharfage: Dry Bulk (h)	Wharfage: Liquid Bulk (i)	Space Rentals (j)	Accessorial Services (k)	Special Facilities (l)	Crane Rentals (m)
	Plant costs (Schedule I)												
1	Break-bulk	Direct											
2	Combination container	Sch. IA				x	x	x	x		x	x	
3	Container	Direct						x	x		x	x	
4	Dry bulk	Direct			x	x		x	x		x	x	
5	Liquid bulk	Direct			x	x	x		x		x	x	
6	Space rentals	Direct			x	x	x	x			x	x	x
7	Special facilities	Direct		x	x	x	x	x	x		x	x	x
8	Sub-total			x	x	x	x	x	x	x	x		x
	Operating expenses												
9	Superintendence	8											
10	Utilities (net of sales)	8											x
11	Unclassified	8											x
12	Direct Labor	Col. (k)		x	x	x	x	x	x	x			x
13	Indirect labor	Col. (k)		x	x	x	x	x	x	x		x	x
14	Watchmen	Col. (k)		x	x	x	x	x	x	x		x	x
15	Other direct costs	Col. (k)		x	x	x	x	x	x	x		x	x
16	Other indirect costs	Col. (k)		x	x	x	x	x	x	x		x	x
17	Operating equipment	Col. (k)		x	x	x	x	x	x	x		x	x
18	Sub-total			x	x	x	x	x	x	x		x	x
19	Administrative expense	9											
20	Total costs												x

SCHEDULE III—SPECIAL FACILITIES

Line No.	Account Description (a)	Distribution Base (b)	Total Cost (c)	(Columns Reserved for Detail as Desirable)
	Plant costs (Schedule I)			
8	Special facilities			
	Operating Expenses			
9	Superintendence			
10	Utilities (net of sales)			
11	Unclassified			
18	Sub-total			
19	Administrative Expense			
20	Total costs			

SCHEDULE IV—ACCESSORIAL SERVICES

Line No.	Account Description (a)	Distribution Base (b)	Total Cost (c)	Service Charge (d)	Load and Unload Cars (e)	Load and Unload Trucks (f)	Line Handling (g)	Man Hour Charge (h)	Storage R & D (i)	Other Services (j)
	Operating expenses									
10	Superintendence									
11	Utilities (net of sales)									
12	Unclassified									
13	Direct labor									
14	Indirect labor									
15	Watchmen									
15	Other direct costs									
17	Other indirect costs									
18	Operating equipment									
19	Sub-total									
20	Administrative expense									
21	Total costs									

No. 84-16

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY,
and JESSE R. HUFF,
members of the California State Lands Commission,
Appellants,
vs.
WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE APPELLEES

PHILIP K. VERLEGER
Counsel of Record

JOHN P. ZAIMES
MCCUTCHEN, BLACK,
VERLEGER & SHEA
600 Wilshire Boulevard
Los Angeles, California
90017
(213) 624-2400
Counsel for Appellees Western Oil and Gas Association, et al.

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

QUESTION PRESENTED

Whether a state bordering on the ocean, owning 93% of tide and submerged land (and, together with its local political instrumentalities, owning all available such land) may collect the equivalent of a tariff on goods exported to or imported from abroad and to and from other states by charging a throughput rental for crossing of tide and submerged lands. A throughput rental means a charge for each barrel (or other measure) of cargo crossing leased state tide or submerged land.[1]

PARTIES BELOW

Appellants are as described in their brief. Appellees include, in addition to those described in appellants' brief, Edgington Oil Company.

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[1] This case does not involve the validity of such a charge on other than tide or submerged lands. Appellants' brief states the question much too generally.

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BRIEF FOR THE APPELLEES

OPINIONS BELOW

The opinions below are those referred to by appellants in their brief.

JURISDICTION

The basis for jurisdiction is as set forth by appellants in their brief.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATIONS INVOLVED

1. The Commerce Clause, the Import-Export Clause, and the Tonnage Clause of the United States Constitution are as set forth by appellants, as is the challenged provision for a "throughput" charge.

2. In addition, the provisions of Section 3 of the Submerged Lands Act, 43 U.S.C. § 1311, are as follows:

> "(a) It is determined and declared to be in the public interest that
>
> (1) title to and ownership of the lands beneath navigable waters within the bounderies of the respective States, and the natural resources within such lands and waters, and
>
> (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
>
> (b) (1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources."

3. Article X of the California Constitution provides as follows:

§ 3. *Tidelands, Withholding From Grant or Sale.*

> All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations; provided, however, that

any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest.

§ 4. *Access to navigable waters.*

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

STATEMENT OF THE CASE

A. The Basic Controversy.

This case concerns the imposition of a charge on lessee importers or exporters of petroleum for crossing state tide and submerged lands. From the inception of the Constitution, it has been recognized that the States owned the land beneath the harbors and other navigable waters within their borders. *United States v. California*, 332 U.S. 19, 31 (1947), acknowledges as much. That decision denied the States such a title along the coast out to the three-mile limit. But in 1953, Congress adopted the

Submerged Lands Act, conveying to the states title to all land underlying the harbors and seas of the United States from the mean high tide mark to the three-mile limit. 43 U.S.C. § 1301, *et seq.* Congress thus surrounded the United States with a band of real property, the legal title to which rested in the states rather than the federal government. Use of the submerged land obtained from these two sources is essential for all maritime and a great deal of pipeline commerce. Every dock must be placed upon the tidelands; every pipeline connection to every offshore well must be placed upon those tidelands. Virtually every anchorage where every tanker or ship comes to rest is within that band of property. The State (or its creations, cities to whom it has granted such property) has physical control over all such properties. No docks, no pipelines, none of the facilities which are essential to maritime commerce can be constructed without the consent of the State or its instrumentalities. The State itself owns more than 93% of all tide and submerged lands and, with its instrumentalities, virtually 100% (*See* discussion *infra*, pp. 26-27). Although appellants now urge the contrary, both the District Court and the Court of Appeals found that plaintiffs *must* use State lands. (J.S.App. A-2, 17-18.)

The question presented here is whether the State may use this control to impose what amounts to a duty or tariff on goods imported by sea into the State. As will be shortly demonstrated, the State has adopted regulations allowing it to collect as rental what it calls a "throughput rental"; *i.e.*, a charge for every barrel of petroleum and other merchandise which crosses this band of real estate, using as a foundation its power to require a lease for the construction of the dock or pipeline required to bring such crude oil into the state. In our view, that charge is not different from a straightforward tariff. It is measured in the same way; it is paid by the same people; the

governing event is the same. Nonetheless, the State justifies it, essentially on the premise that as owner of the tidelands, it can charge whatever "rental" it wishes.

B. Position of The Parties.

Appellants are the members of the California State Lands Commission. They are the state officials who adopted and consequently enforced the challenged regulation.

Appellees are the Western Oil and Gas Association and certain of its members (hereafter "WOGA" or "lessees"). WOGA is a trade association comprising most of the individual companies in the oil business who are affected by the rule we challenge. These are companies engaged in the transportation in foreign and interstate commerce of petroleum and petroleum products which must traverse the State's tidelands, its sea border. They have constructed facilities of great value in part upon tidelands and in part on adjoining real estate. Those facilities include refineries, wharves, mooring facilities, petroleum-producing platforms and oil and gas pipelines. (J.A. 19-20, 52-3, 59-60, 73-4, 89-90.) Utilization of these facilities is indispensable to the interstate and foreign flow of crude oil, gas and petroleum-derived products.[2] In turn, because of their location, the State's lands are indispensable to the use of the facilities for such commerce.[3]

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[2]For example, about 95% of the crude oil which passes over the State's land into Chevron's Richmond refinery moves in interstate or foreign commerce (J.A. 61); 100% of Shell's crude is interstate or foreign (J.A. 75); 100% of Union Oil's (J.A. 22).

[3]Based on the lessees' declarations, both the District Court and the Court of Appeals found:

> "Plaintiffs own several oil and gas processing plants located on or near the coast of California. The amount of capital invested

C. History of the Regulations.

Prior to 1976, the State Lands Commission's (hereafter "SLC" or "Commission") practice was to appraise the land used by a dock, pipeline or other facility and fix a rental at the percentage which constituted the going market rental for property of that value. The reasonableness of that approach is not challenged: a person who has the exclusive use of a piece of the State's property should pay a fair rental for it, and that method undoubtedly provides for such a rental. Because the fair market value did not exploit for the State the full value of its strategic position, the Commission determined to collect, in addition, a thoughput charge; *i.e.,* a charge based on the volume of commodities crossing the leased land.

The proposed regulations were the subject of several days of hearings. The testimony offered was without exception that the effect of such a system of charges would be to discourage commerce. (See, *e.g.,* J.A. 162-244.)

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in these facilities is substantial. Petroleum substances must enter or depart from these facilities through a system of pipelines. Due to the physical and practical immobility of plaintiffs' processing plants, the pipelines *must traverse tidal and submerged lands owned by the State.* Up to ninety-five percent (95%) of the petroleum substances entering the facilities are of foreign origin. Some forty-six to ninety-eight percent (46-98%) of the petroleum products leaving the facilities are channeled into interstate and foreign commerce. These products remain in such commerce until they reach the ultimate consumer. *See, e.g., Maryland v. Louisiana,* 101 S.Ct. 2114, 2134 (1981)."

(J.S.App A-17-18; *see* J.S.App. A-2, 5 (emphasis added).)

That finding by the two courts below is now firmly established. *Branti v. Finkel,* 445 U.S. 507, 513 (1980), *Pick Mfg. Co. v. General Motors Corp.,* 299 U.S. 3, 4 (1936). The factual basis for such a finding will not be reviewed by this Court. (*Ibid.*)

The Commission attempted to make a record justifying the proposal on the basis that similar charges are made by cities which have received conveyances of tidelands from the State and which operate ports. The record actually is, however, that such rates are not at all comparable. (J.A. 183-4, 413-420.) Ports provide valuable services and facilities, such as dredging, navigation aids and breakwaters. (J.A. 389-450.) In contrast, the SLC provides unimproved land. It does no dredging, provides no navigational aids, breakwaters or other facilities. (J.S.App. A-9-10, 18.)

The Administrative Record contains one report which specifically analyzes the tariffs charged by port authorities for use of their land and facilities. This report, entitled "Final Report and Cost Formula for the California Association of Port Authorities," flatly disproves the SLC's contention that port authorities employ volumetric tariffs which are not based upon a reasonable return on the appraised value of port land and improvements. It states, on the contrary, that ports generally charge on a basis akin to a public utility rate, *i.e.,* on a basis calculated to produce a reasonable return on the investment. (J.A. 400-420.) Finally, the one report in the Administrative Record concerning a fair rental for the SLC's land — the Clark Report commissioned by the SLC itself — recommended a flat eight percent rental. The Report stated that rental formats other than appraisal and percentage were inapplicable to leases of industrial land. (J.A. 324.)

Nevertheless, on April 28, 1976, the SLC amended its regulations for the leasing of all tidelands and submerged lands owned by the State. The regulations were codified in 2 California Administrative Code § 2005 (now § 2003), as follows:

"2005. *Payment of Rentals.*

"(a) . . . .

"(b) Rental Rate Schedule: The following rates shall apply to the classifications listed below:

. . . .

"(2) *Industrial Use:* The rental may be based on eight percent (8%) [now 9%] per annum of the appraised value of leased land together with 1.5 [now 2] cents per diameter inch per lineal foot for pipelines and conduits within the leased premises; and/or *an annual rental, with a specified minimum, based upon the volume of commodities passing over State land*. The minimum rental under either of these alternative rentals shall not be less than $550 per annum."

"(3) *Right of Way Use.* Eight percent (8%) [now 9%] per annum of the appraised land value, together with damages, if any; and/or for pipelines and conduits, 1.5 [now 2] cents per diameter inch per lineal foot per annum, or, in lieu of either of the foregoing, *an annual rental, with a specified minimum based upon the volume of commodities passing over State land.* The minimum rental under any of the above alternatives shall not be less than $100 per annum."

(Emphasis added.)

The italicized portions of these regulations provide for the throughput charge.

D. Application of the Rule.

The rule adopted by the State Lands Commission did not provide for a *fixed* throughput charge. It left the amount of the throughput charge to be "negotiated" separately in each lease made by the State, thus placing the State in the position to charge the maximum that the

traffic would bear. The history of such "negotiations" is as follows:

At the time this action was first brought in federal court, the SLC had already entered into one lease which imposed a throughput charge on the lessee. That lease set the procedural pattern for others to come. In each instance since the regulations were adopted, the SLC has appraised the leased land and has set a minimum rental of eight percent of the appraised value of that leased land. (Today, with the general rise in interest rates, that charge is nine percent.) This method is consistent with that used under the SLC's prior regulations to compute total annual rentals. The Commission, however, has gone on to impose an additional levy based on the volume of commodities passing over the lands being leased. In each such instance, the additional charges have resulted in payments substantially in excess of the fair rental value.

Pacific Refining Company ("Pacific") was the first company to be required to make rental payments, albeit under protest, pursuant to the SLC's throughput regulations. In April of 1976, Pacific purchased a refinery at Hercules, California, from Gulf Oil Corporation ("Gulf") (J.A. 53). As part of the transaction, Gulf agreed to assign its lease rights to Pacific. *(Ibid.)* Consent of the SLC is required before such an assignment can become effective, and that consent was sought by the parties. *(Ibid.)*

During negotiations, the SLC took the position that it would not consent to an assignment unless the lease was amended to include a throughput provision. (J.A. 53-4.) Faced with this predicament, Pacific executed an amendment to its lease containing a throughput provision. (J.A. 53.) All of Pacific's crude is imported (J.A. 54-5.)

At an eight percent annual return, which was then found to be fair market value, Pacific would pay the SLC

$32,500 each year. When a throughput charge was added, for the first few years the charge amounted to an annual rate of return on unimproved state land of 28 to 29 percent of the appraised value of the land. (J.A. 54.)

Other companies faced similar dramatic increases in lease charges. Union Oil Company of California, with a refinery investment of almost 200 million dollars and the vast majority of commodities passing through its pipelines in either interstate or foreign commerce, has been forced to pay an annual net rate of return for its ten-year lease of SLC land of approximately 18 percent for each of the first five years and 23 percent annually for each of the next five years. (J.A. 21.) Chevron U.S.A. Inc., with a refinery investment of over $723,000,000 and approximately 95 percent of the commodities passing through its pipelines in interstate or foreign commerce, pays an average net rate of return from 1977 through 1986 of approximately 21.5 percent each year, with a high return for 1984, 1985 and 1986 of over 24 percent a year. (J.A. 60-61.)

One final example is provided by Shell Oil Company, whose wharf connects to its Martinez manufacturing complex. One hundred percent of its crude oil transported over the wharf is in interstate or foreign commerce. (J.A. 75.) The throughput charge results in an *average* annual net rate of return of 17.57 percent, which approximately doubles the rent. *(Ibid.)*

ARGUMENT

I

Preliminary

Throughout this case, we have rested our arguments on a few basic propositions. The State has never chosen directly to address any of them. They are as follows:

1. The State may without doubt, subject companies in interstate or foreign commerce to a considerable variety of taxation uniformly applicable to all business within the state. But it is equally without doubt that under the Constitution no state or state instrumentality may impose a tariff on goods for the simple privilege of entering the state, whether the tariff be one on goods traveling in interstate commerce or goods in foreign commerce.

This principle is not of recent origin. Indeed, the proliferation of local tariffs under the Articles of Confederation was the principal cause for the calling of the Philadelphia Convention which wrote the Constitution. The principle continues to have current significance; economic balkanization has not come to be more attractive with the passage of time.

2. From the days of the Articles of Confederation, the land beneath the harbors has belonged to the State. *(See United States v. California,* 332 U.S. 19, 31 (1947).) In addition, in 1953, by the Submerged Lands Act (43 USC § 1301 *et seq.*), Congress granted to the states coastal tide and submerged land from the mean high tideline out to the three-mile limit. These tide and submerged lands are the lands on which both docks and pipelines to and from vessels or outer Continental Shelf installations have to be built. The State by itself has 93% of such lands: with its political subdivisions it has essentially all. It is impossible to land commodities so transported, whether solid or liquid, without utilizing the lands thus held by the states or their instrumentalities, the cities. If the State can collect a volumetric charge based simply on the amount of a commodity which crosses tide and submerged acreage — as "rental" for the use of that land (without reference

to any other service performed) — then it can collect an amount which differs in no respect from a tariff. But California cannot be permitted to rely on a "rental" formula that exploits its control over the crucial tidelands. "[A]s it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form" *License Cases,* 46 U.S. (5 How.) 504, 576 (1847).

3. The State has made no claim that it is free to collect a tariff. And up to this moment, the State has not sought to demonstrate that there is so much as a nickel's difference between a tariff, a tax, or a "throughput rental" placed on every barrel of petroleum brought into the state. It has, rather, sought to establish the proposition that so long as the charge is designated "rent," and perhaps so long as it resembles some charge sometimes collected by private lessors, the State can charge anything it wants. Those propositions are invalid. Although the volumetric rates are designated as "rent" by the State, it is the practical effect of an exaction, not its label that is the focus of analysis under the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 615 (1981); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977); *Nippert v. Richmond,* 327 U.S. 416, 431 (1946).

Since the State does not seriously contend that its charges could be justified as a tax, our discussion of principles applicable to taxation will be brief. But because the principles involved are vital, we will start with them.

II

The Constitution Denies to the States the Power to Collect a Charge on Goods for Entry into the State.

The limitations on State power with which we are concerned here are no recent invention. They have their origins in the very formation of the Constitution. It is a familiar fact of history that in the days of the Articles of Confederation the states levied an array of duties and protective tariffs, both on imports from abroad and from other states.

> "Finance, commerce, and business assembled the historic Philadelphia Convention; although it must be said that statesmanship guided its turbulent councils. The senseless and selfish nagging at trade in which the States indulged, after peace was declared, produced a brood of civil [abuses.] The States passed tariff laws against one another as well as against foreign nations; and, indeed, as far as commerce was concerned, each State treated the others as foreign nations. There were retaliations, discriminations, and every manner of trade restrictions and impediments which local ingenuity and selfishness could devise.
>
> The idea of each State was to keep money from going outside its borders into other States and to build up its own business and prosperity at the expense of its neighbors. States having no seaports were in a particularly hard case. Madison picturesquely describes their unhappy plight: 'New Jersey placed between Phila. & N. York, was likened to a cask tapped at both ends; And N. Carolina, between Virga. & S. Carolina to a patient bleeding at both Arms.' Merchants and commercial bodies were at their wits' end to carry on business and petitioned for a general power over commerce.

The commercial view, as stated by Madison, was that 'the National Government should be armed with positive and compleat authority in all cases which require uniformity; such as the regulation of trade, including the right of taxing both exports & imports, the fixing the terms and forms of naturalization, &c, &c.' "

Albert J. Beveridge — *The Life of John Marshall*, Vol. I, pp. 310-312 (1916).

* * * *

"The import duties levied by the states created conflicts between the states. Some states — New York particularly — greatly lightened the burden of internal taxation by collecting substantial levies from foreign commerce. New Jersey was embittered by the fact that both New York and Pennsylvania collected import duties on goods intended for sale in New Jersey, duties which were eventually paid by the residents of New Jersey. North Carolina suffered similarly from action taken by Virginia and South Carolina. The states collected duties, not merely on goods from abroad, but on those brought in from other states as well. Virginia, with an eye particularly to the commerce of Pennsylvania and Maryland, provided for the confiscation of vessels which failed to pay duties. Restrictive laws applied to importations by land as well as by sea. Pennsylvania collected tolls on large numbers of items imported from other states. Some states enacted similar tariff measures for the combined purpose of raising revenue and giving protection to home products. If the legislation achieved these ends to some extent, it achieved also the undesirable results of interfering with the development of interstate business and of creating antagonism among the states.

* * * *

Experience with government under the Articles of Confederation demonstrated the need for certain fundamental changes if order was to be maintained and business and commercial relationships preserved and promoted. The federal government needed the power to raise revenue without the intervention of the states. In order to maintain satisfactory relations with foreign countries, it needed the power to regulate foreign commerce. In order to promote industry and commerce at home, it needed the power to levy import duties and to take over from the states the regulation of interstate commerce. It needed the power to break down and prohibit commercial barriers among the states, to deal with the national and state debts, and to prevent the forcible satisfaction of debts by depreciated paper money or by the tender of other property less acceptable to creditors than coin. It was believed that these and related measure would restore order, promote industry and commerce, and redound to the benefit of all classes of people. These considerations provide the background for the story of the adoption of the new Constitution."

Swisher, *American Constitutional Development*, pp. 25-27 (2d Ed. 1954).

* * * *

"The Constitutional Convention was called because the Articles of Confederation had not given the Federal Government any power to regulate commerce. This defect proved to be so serious that the Virginia General Assembly appointed commissioners to meet with commissioners of other states to 'take into consideration the trade of the United States; to examine the relative situation and trade of the said

states; to consider how far the uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object. . . .' Representatives of but five states met at Annapolis in September, 1786. They determined that they could do nothing by themselves, and that the adequate protection of commerce required a complete revision of the structure of government. Accordingly, they recommended that a convention be called for the purpose of revising the Articles of Confederation, and Congress thereupon asked the various states to send delegates to Philadelphia in May, 1787."

Robert L. Stern, *That Commerce Which Concerns More States Than One,* 47 Harv.L.Rev. 1335, 1337-41 (1934).

* * * *

At least three provisions of the Constitution have their roots in these problems, the Commerce Clause, the Import-Export Clause, and the Tonnage Clause. Overall, the purpose of these provisions was (1) to reserve to the United States the revenue from duties or imposts, (2) to preclude the development of a system of trade barriers at the seacoast by the States, and (3) to establish the United States as a single area of free trade without internal walls of any kind (*See Michelin Tire Corp. v. Wages,* 423 U.S. 276, 285 (1976) *reh'g denied,* 424 U.S. 935.); *see also Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 449-50 (1979); *Dept. of Revenue of Wash. v. Assn. of Wash. Stevedoring Cos.,* 435 U.S. 734, 753-4 (1978).

There is an abundance of early authority applying these sections to preclude a variety of charges sought to be collected from imports, exports and interstate commerce.

In the seminal case of *Brown v. Maryland,* 25 U.S. 419 (1827) this Court, per Chief Justice Marshall, held invalid under the Import-Export Clause a Maryland Law imposing a license fee on importers. In the *Passenger Cases,* 48 U.S. (7 How.) 283 (1849), ordinances imposing a charge on every person entering the state were held invalid. In *Crandall v. Nevada,* 73 U.S. (6 Wall.) 35 (1867) the charge was on anyone entering or leaving by train. In the *State Freight Cases,* 82 U.S. (15 Wall.) 232 (1873), the charge was on freight crossing a state border. The result was the same in all of these cases: the exaction was invalidated.

Later decisions expressly found a volumetric charge based on oil flowing in interstate commerce to be invalid as an undue burden on interstate commerce. That was the conclusion reached by this Court in *Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265 (1921). There, plaintiff owned a system of pipelines in West Virginia which were connected with other lines in Ohio, Kentucky and Pennsylvania. The West Virginia two-cent throughput tax on each barrel of oil transported over plaintiff's lines was struck down. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954) *reh'g denied,* 347 U.S. 931, represented the first of many unsuccessful attempts by the State of Texas to impose a throughput tax upon the interstate export of natural gas. (*See, e.g., Calvert v. Transcontinental Gas Pipeline Corporation,* 341 S.W.2d 679 (Tex.Civ.App. 1960) and *Calvert v. Panhandle Eastern Pipe Line Co.,* 371 S.W.2d 601 (Tex.Civ.App. 1963).) The Court reached the same result as in *Eureka Pipe Line.*

We know of no modern case which is inconsistent with the result in those decisions: no case in which a simple charge by a state for the privilege of bringing merchandise in or out of a State has been upheld. But there are two other lines of authority which require discussion.

The first such line is that which deals with taxes of general application as they affect imports or interstate commerce. In *Michelin Tire, supra,* 423 U.S. 276 (1976), this Court approved the application of a general *ad valorem* property tax to imported goods. In *Washington Stevedoring, supra,* 435 U.S. 734 (1978), the Court approved application of a nondiscriminatory state income tax law. Those cases discard the old original package doctrine, looking instead, for purposes of the Import-Export Clause, at whether the tax in question is what would have been considered an "impost" or "duty" when the Clause was drafted. But *Michelin Tire* makes it absolutely clear that, if one were dealing with a simple charge for the privilege of bringing merchandise into the country, such a charge would be precisely what is prohibited. For in distinguishing an *ad valorem* property tax from imposts and duties, the Court describes such a tax as:

> *"Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country. . ."*
>
> 423 U.S. at 287 (emphasis added.)

And again:

> *"The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods. . ."*
>
> *Ibid.* (emphasis added).[4]

The opinion then goes on to point out that a foreign origin does not permit escape from uniform obligations

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[4] *Amici* rely on *Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1975) *cert. denied*, 421 U.S. 978. *Procter* deals with a state's police power over pollution and has little or nothing to do with our problem here.

imposed on imports and non-imports alike. But all of that says plainly that a straightforward tax on goods for the privilege of entry is unconstitutional. As the concurring opinion of Justice Powell points out in *Washington Stevedoring,* a flat fee "merely for 'the privilege of moving through the State' " is bad. (435 U.S. at 764.) In the present case, the "fee" is charged simply for the privilege of crossing tide and submerged lands — *i.e.,* for the privilege of entering. We do not believe that calling the fee a "rental" changes the problem a bit.

The second line of cases requiring discussion is that of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines Inc.,* 405 U.S. 707 (1972). That case involved a fee of one dollar per passenger charged by the state for the use of an airport, essentially as a way of defraying construction and operating costs. *Evansville Airport* distinguished *Crandall v. Nevada, supra,* on the ground that interstate commerce may be charged for the cost of services provided. The Evansville Airport charge was so limited; that in *Crandall* was not. In the present case, both the District Court and the Court of Appeals found that the charge has nothing to do with defrayal of costs (J.S. App. A-9, 12, 22), and, again, the finding is not contested here.[5]

It is worth noting in this connection that the old cases dealing with "tonnage taxes" draw the same line. A tonnage tax was a term applied to a charge on a ship for the privilege of tying up at a dock or anchoring in a harbor. The Constitution expressly forbids such charges. And the line drawn was that a city (a city, as a political subdivision of a state, is subject to the same rule) could charge for the use of a dock the city provided, but could

[5]Under the "two court rule," such a finding will not be disturbed by this Court. *See Pick Mfg. Co. v. General Motors Corp.,* 299 U.S. 3, 4 (1936).

not charge for the use of an unimproved harbor or stream. Those cases are discussed infra, in part III. Thus, we have again a basic principle going back to the origins of the Constitution.

III.

The Market Participant Doctrine Is Inapplicable.

A. Application of the Doctrine Would Contravene the Policy of the Commerce Clause.

The State makes no serious argument that its system of charges would be valid if considered as a tax, impost, or duty. Virtually its entire argument is directed to the proposition that the State, as a lessor, is a market participant under cases such as *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *White v. Massachusetts Council of Constr. Employees, Inc.*, 460 U.S. 204 (1983); and *South-Central Timber Development, Inc. v. Wunnicke*, ______ U.S. ______, 104 S.Ct. 2237 (1984), and therefore, as lessor, it can charge what it wants.

The circumstances of those cases are remote from those presented here, and the doctrine totally inapplicable.

This case involves the uses of the tide and submerged lands of the states. The states did not acquire those lands as part of some enterprise into which the state entered as a voluntary market participant: on the contrary, titles to inland tide and submerged lands were acquired by the original states in their sovereign capacity as successors to the rights of the crown in England. (Later, states such as California acquired title to inland tidal and submerged inland waters upon admission to the Union.) Coastal titles were acquired pursuant to the grant made by the United States under the Submerged Lands Act.

And these rights are held, both under state and federal law, subject to special obligations toward commerce. Thus, under the Submerged Lands Act, the State's title is held subject to the paramount rights of the United States with respect to navigation. Those waters may not be obstructed without the permission of the United States, through the Secretary of Transportation or the Army Corps of Engineers. 33 U.S.C. § 401. In addition, under the California Constitution, the State's title to these lands is held in trust for fishing, recreation, navigation and commerce. Cal. Const. Art. X, §§ 3-4; *Marks v. Whitney,* 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374 (1971); *City of Long Beach v. Mansell,* 3 Cal.3d 462, 91 Cal.Rptr. 23, 476 P.2d 423 (1970). This is not a proprietary title; it is, rather, a public purpose title.

It would be a total negation of the basis of the State's title to hold that, with respect to the lands in question, the State's position is analogous to that which it holds when it chooses to operate a cement plant (*see Reeves v. Stake, supra*). And the problem goes beyond that.

The denial by the Constitution of the power to impose imposts or duties on foreign commerce, and the equivalent prohibition implied under the Commerce Clause for interstate commerce, all existed for a powerful reason. The experience of the Articles of Confederation demonstrated the disastrous consequences of leaving in state hands the power to impose a charge merely for the privilege of entering or leaving the state. The constitutional policies created to obviate that problem are not to be casually evaded.

Liquid cargoes have to be moved either across docks or from anchorages in pipelines. If the constitutional prohibition against such charges can be circumvented merely by designating the charge as a "throughput rental" then

there is nothing left of the prohibition. Since the prohibition against such charges was and is a basic part of the effort in the Constitution to prevent the balkanization of the United States, it would hardly be sound thus to permit its evasion.

In this connection, it is most significant to note the trouble to which the Founders went to prevent such evasion. The obvious way to avoid the prohibition of imposts and duties was to place the charge on the ship rather than the cargo. Such a charge was known as a "duty of tonnage". The founders therefore included a prohibition on "duties of tonnage" as well.[6]

As we said above, it is most significant that the old cases which deal with this section draw much the same line as is drawn in the *Evansville Airport* case.

Essentially, the Clause forbids the state to levy a charge on the privilege of access by vessels to its ports. *Clyde Mallory Lines v. Alabama,* 296 U.S. 261 (1935). It has been applied to airplanes as well as to vessels because the focal point is not the vessel itself but the fact that the vessel has become an instrumentality of interstate or foreign commerce. *Scandinavian Airlines System, Inc. v. County of Los Angeles,* 56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25 (1961) *cert. denied,* 368 U.S. 899.

While most commonly applied to fees charged marine vessels for entrance to a port, the proscription against duties of tonnage applies to all fees levied against vessels or goods as a condition of access to the territorial limits of a state, regardless of how such fees are measured. *Clyde Mallory Lines, supra.*

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[6] In more detail:

> "No State shall, without the consent of Congress, lay any Duty of Tonnage . . ."

United States Constitution, Art. 1, Sec. 10, Clause 3.

Fees for access, however, are distinguished from fees for services. Fees *may* be imposed upon marine vessels or goods transported to a state's port or shore where such fees compensate the state for services and facilities "such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like." (*Clyde Mallory Lines, supra,* 296 U.S. at 265.) *Quid pro quo* is the controlling principle. A state may ask compensation for services it has rendered or benefits it has foregone, but such compensation is all it may ask. Any other charge on such commerce is unconstitutional.

In *Cannon v. City of New Orleans,* 87 U.S. 577 (1874), for example, the City of New Orleans enacted an ordinance which imposed a charge on all vessels "which shall moor or land in any part of the Port of New Orleans." The Court held the ordinance was unconstitutional.

Similarly, in *Harmon v. City of Chicago,* 147 U.S. 396 (1893), the City of Chicago exacted a charge from owners of vessels operating on the Chicago River. In reversing and declaring the ordinance unconstitutional, the Court held that the charge was a tax for the use of navigable waters and not a charge by way of compensation for any specific improvement. *See also, Inman S.S. Co. v. Tinker,* 94 U.S. 238, 242-243 (1877).

The SLC has relied on *Keokuk Northern Line Packet Co. v. City of Keokuk,* 95 U.S. 80 (1877). There, the Court held valid a license fee imposed as compensation for services rendered by the City of Keokuk. But the Court was careful to point out that:

> "In nothing that we have said, do we mean to be understood as affirming that a city can, by ordinance or otherwise, charge or collect wharfage for merely entering its port, or stopping therein, *or for the use of*

that which is not a wharf, but merely the natural and unimproved shore of a navigable river."

95 U.S. at 88-89 (emphasis added).

It is precisely the "natural and unimproved shore" that the State wants to charge for in our case. The controlling principle is clear from these cases: a state may ask compensation only for *services rendered* to vessels bringing goods to "the territorial limits of a state . . . ", but not for the "unimproved shore." In the instant case, no assistance is rendered, nor are facilities furnished by the State to aid the lessee in transporting goods from the vessels into the state. Rather, the State provides unimproved land only, and it is the lessee who builds and maintains wharves, pipelines and other facilities for use in its operations. (J.S.App. A-9, 18.) Indeed, lessees are responsible for the removal of any such facilities upon expiration of the lease.

We point out again, this is precisely the line drawn by *Evansville Airport* for the Commerce Clause generally.

B. The Market Participant Doctrine May Not Be Applied to Evade Constitutional Strictures.

The *only* application of the market participant doctrine to date has been to allow the state, as the proprietor of an enterprise, the freedom to determine with whom it will deal. Thus, in the case of a state-owned cement plant or state-run scrap auto project, the state may discriminate against non-residents. *Hughes v. Alexandria Scrap Corp., supra; Reeves v. Stake, supra; see White v. Massachusetts Council of Constr. Employees, supra.* But ownership gives no blank check. In the recent case of *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden,* ___ U.S. ___, 104 S.Ct. 1020 (1984), this Court held invalid under the Privileges and Immunities Clause a requirement that a

city contractor give preference to local residents. And in *South Central Timber Development v. Wunnicke,* ____ U.S. ____, 104 S.Ct. 2237 (1984), this Court divided evenly on the permissible inclusion in a state contract of a clause requiring the purchaser from the state of timber to cause processing to take place within the state. There is no suggestion in any opinion on the subject that "market participation" would permit a state to avoid policies which are explicit or implicit in the Constitution.

Indeed, in *Reeves* itself, this Court quoted with approval the following principle from *Alexandria Scrap:*

> ". . . The Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."

(*Id.* at 2277.)

We have already seen, however, that there is indeed a constitutional plan against the imposition of state charges for entry of goods, evidenced by at least three separate constitutional provisions and numerous decisions. That legal title does not allow escape from this plan is shown by *Foster-Fountain Packing Co. v. Haydel,* 278 U.S. 1 (1928) (which holds that state title to shrimp caught within its borders did not validate restrictions on the export of unprocessed shrimp) and *Haskell v. Cowham,* 187 F. 403 (8th Cir. 1911) (which holds that title over streets did not validate a law forbidding the construction of interstate natural gas pipelines crossing those streets). *Accord Hughes v. Oklahoma,* 441 U.S. 322 (1979) (relied on by *amici,* which reaches a similar conclusion in rejecting a state claim that it was the owner of wild minnows, and could therefore prevent their export).

IV.

The State's Market Participant Argument Rests on Fiction

The State argues essentially that it is merely one of a number of competitors with land available for lease; *ergo*, if an oil company is discontented, it can pick up its refinery and go somewhere else. The argument ignores the real world. Refineries are enormous complexes involving hundreds of millions of dollars in equipment. They are not on wheels. And there is essentially no coastline which does not belong either to the State of California or its political subdivisions. Appellants' map appended to their brief demonstrates that.

In addition, the State's argument (1) rests on concealment of the enormous percentage of tide and submerged lands the State owns — some 93%, (2) disregards the findings of the two courts below that the refiners "must" use State property and (3) asserts that there is private property available, when in point of fact, appellants well know that the tiny amount of privately patented tide and submerged lands cannot with any security be used for any sort of structure without an act of the legislature.

The State suggests that it is in competition with the variety of public entities to which it has granted tide and submerged land. The truth is that the public entity holdings are minuscule as compared to the State's. There are approximately three million acres of coastal tide and submerged lands. Of this, only some 200,000 acres have been placed under local jurisdiction. We quote the appellants' official publication:

> "In addition to the 49 plus million acres of land in public ownership listed in this report, there are approximately 3 million acres of coastal tide and submerged lands, of which some 200,000 acres have

been placed under local jurisdiction by legislative grant. The remainder is under the jurisdiction of the State Lands Commission."

> California State Lands Commission, *Public Land Ownership in California*, p. i. (1977).

That leaves some 93% of the tide and submerged land in the State's possession.

In a constitutional sense, it makes no difference whether a particular piece of harbor shoreline or coastline is directly held by the State or has been granted by it to a city. The city, as a political subdivision of the State, is subject to the same strictures. *United Bldg. and Constr. Trades Council*, supra, 104 S.Ct. at 1026 (1984). And, in a practical sense, the budgets of city and state are today closely intertwined: the state provides funds for a wide range of local activities,[7] determines the levels of both real property and sales taxes the city may charge,[8] and dictates the conduct of its affairs in countless other ways. What goes into the pocket of one benefits the other. In its recent "bathtub conspiracy case" this Court held that parent and subsidiary corporations cannot realistically be held to be competitors. *Copperweld Corp. v. Independence Tube Corp.*, ___ U.S. ___, 104 S.Ct. 2731 (1984). In the same way, to speak of state and city as competitors in a marketplace is artificial.

Because refineries, treatment plants, and the like cannot be moved, the Court of Appeals has pointed out that

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[7] *See, e.g.*, Cal. Educ. Code § 14000, *et seq.* (state funding for local school districts); Cal. Welf. & Inst. Code § 1805 *et seq.* (state funding for local correctional programs); Cal. Water Code § 13985 *et seq.* (state funding for local clean water programs); Cal. Harb. & Nav. Code § 72.5 (state funding for small craft launching facilities); Cal. Health & Safety Code § 1100 *et seq.* (state funding for local health services programs).

[8] *See, e.g.*, Calif. Const. Art. XIIIA (Prop. 13).

the State has an effective monopoly. When lease renewals are negotiated, the dock has been built and the pipeline constructed. The refinery is already located. If, as each of the declarations shows, the State has the adjoining tidelands, (J.A. 20, 53, 60, 74, 90.) then the lease has to be obtained from the State.

Appellants attempt to meet this argument by a double-barrel speculation. They maintain, to start with, that it is not true that refineries are typically served by dedicated terminals. They make the assumption — and argue to this Court that it is a fact — that because there is a network of pipelines serving this state, that in general, oil comes in at one terminal location and is pipelined to some other refinery location. The short answer is that this argument asks the Court, on pure speculation, to upset the findings of both courts below that plaintiffs *must* use the State's land. Beyond that, this is a speculation which is inconsistent with the declarations filed, on the basis of which summary judgment was granted. Each plaintiff company has a refinery served by immediately adjacent marine terminals which are in fact a part of the refinery complex and which are essential to its functioning. (J.A. 20, 52-3, 59-60, 74, 89-90.)[9] That is not to say that there are no refineries which function in the way that the State asserts. These are refineries which are located inland, rather than adjacent to salt water, and which must receive imported crude by pipeline over land after it is brought ashore (if at all). But that is not the general rule.

Moreover, this argument is no answer at all to the underlying problem. All of the imported or interstate crude has to come ashore somewhere. For all practical purposes, all available sites are in the hands of either the State or the cities whose affairs the State controls. If the

[9]The declarations further show that better than 95% of incoming crude is in interstate or foreign commerce. (J.A. 22, 54-5, 61, 75.)

State is successful in collecting a tariff through this sort of fee, one may be quite certain that the cities will swiftly follow. Indeed, it is the State's claim that the cities are doing it already. (Appellants' Brief, pp. 9, 26.)

The State further maintains that, because its charges are a matter of "negotiation" they are somehow validated. One might ask, if the law explicitly said that California will exact a tariff from all oil brought ashore from vessels anchored in state waters, whether the law would be validated if it went on to say "and the amount of such tariff shall be negotiated between the State Customs House and the importer." If one wishes to utilize tide or submerged lands along the coast of California, one must reach an understanding as to terms with the State or with one of the State's political instrumentalities — there is no place else to go. The State's own data confirms this. First, the map provided by the State and attached to its brief depicts in each harbor area a small encircled portion where, because the city has developed the harbor, it has been granted land by the State in trust under terms dictated by the State.[10] But even the map shows that the broad sweep of the State's title essentially goes from the Mexican border to the Oregon border. Moreover, the State's own report (cited, *supra*, at pp. 26-27) reaffirms that it directly controls some 93% of the coastline.

The State also compares its ownership to the ownership of a parcel of land in the middle of the city, and it says, quite correctly, that the owner of that land has the monopoly of that land. (Appellants' Brief, p. 21.) That is why commercial developers typically acquire fee title before erecting costly structures on downtown lots. The

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[10]Moreover, if such land turns out to be productive of large amounts of income, under California law, the State has the continuing power to reclaim it. *See Mallon v. City of Long Beach*, 44 Cal.2d 199, 282 P.2d 481, (1955).

monopoly that the State and its instruments have of the coast land and the harbors eliminates those alternatives to submitting to the landowner's monopoly power. The SLC's land cannot be sold. (Cal. Admin. Code § 2030(a)) And, by the State's own admission, lease renewals are usually only 10 years' duration (Appellants' Brief, p. 22).

There is also a suggestion in the State's brief that when a lease for a dock or a pipeline right-of-way is negotiated, the oil company will thereupon plan on amortizing the adjacent refinery over the period of the lease. This is both pure speculation and inconsistent with the real world. The major refineries both in northern California and in southern California have existed since the 1920's. Over time, as the population of the state has grown, they have been modernized and expanded; new processing units have been installed, all as the market enlarged and the technology developed. At no point is the time ever reached when it is logical for a refinery to say: at this point all of the equipment has been amortized, and our dock lease has expired, and therefore I am free to depart without loss.

The State also suggests that there are significant private landholdings which could be used to bring a pipeline to shore and they suggest that, somehow or another, by using such lands and circuitously routing pipelines, State properties could be avoided. They cite as their principal authority an article written by Assistant Attorney General N. Gregory Taylor, one of the listed counsel on appellants' brief. The article indicates that a private owner acquires only a "naked legal title"[11] and concludes that:

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[11]As the article points out, long ago, the coastline patenting of certain tidelands to private hands was once allowed.

"From this we may conclude that under *Marks*[12] *no private use of undeveloped or relatively undeveloped tidelands can be made by the private patentee of such lands with any assurance that it will not be inconsistent with the remaining public trust easement.* To proceed safely with any development the private patentee will have to obtain a legislative finding that his particular lands are no longer necessary for trust purposes."

Taylor, Patented Tidelands: A Naked Fee?, 47 Cal. State Bar J. 420 at 486 (1972) (emphasis added).

There is no basis on which it can be prudently assumed that any of the relatively modest amount of privately held tide and submerged land that exists here and there would be used for any of the purposes with which a refiner would be concerned without the risk that it will one day be deemed inconsistent with the public trust and will revert to the State.[13]

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[12]*Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal.Rptr. 790(1971).

[13]In addition, the 80,000 acres the State refers to (Appellants' Brief, p. 6) is less than 2% of the total. We know of no such land at any location where it would be useful for these purposes.

V.

The Throughput Charge is Inherently Discriminatory Against Interstate and Foreign Commerce

It is fundamental that local legislation may not discriminate against interstate or foreign commerce. *Bacchus Imports, Ltd. v. Dias*, ____ U.S. ____, 104 S.Ct. 3049 (1984); *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977). It is equally fundamental that the presence or absence of discrimination is determined by the actual operation of the regulation or law. *Hunt v. Washington, supra; Nippert v. City of Richmond*, 327 U.S. 416 (1946).

There can be no question but that today, a charge on merchandise for crossing the coastline is inherently discriminatory. The reason is a simple one. In general, intrastate merchandise does not go by ship. Indeed, on the west coast, marine intrastate transportation largely ended before World War II. As to crude oil, today almost all intrastate shipment is by pipeline or by truck. (There is a limited movement of crude from the Santa Barbara-Ventura area by tanker to either Los Angeles or the San Francisco bay area to the extent that production exceeds available pipeline capacity. But that is all. And plans have been announced for the construction of a pipeline from Santa Barbara to Los Angeles, which will end most of that.) For practical purposes, the throughput charge is a tax on imports and on crude brought in from Alaska.[14] The discrimination against commerce is obvious.

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[14]The record does not develop the difference between the amounts of crude brought in, and products shipped out. In fact, we are predominantly concerned with crude shipped in. It is judicially noticeable that California is and for many years has been a crude-short area as an oil importing area. (*See, i.e.*, Bohi and Russell, *Limiting Oil Imports*, (1978) Frontispiece and p. 68). While products do move out of plaintiff's terminals, the volume is inconsequential as compared to the

The seriousness of the discrimination placed on interstate and foreign commerce is graphically demonstrated by the disproportionate rentals produced. The Clark Report commissioned by the State indicated that, at the time in question, the going rate of rental for industrial properties was 8% of its appraised value. (J.A. 339.) That 8% rental was duly provided for in the leases identified in this record. The State then went ahead and, *in addition*, collected the throughput rent with the result that the total was on the order of 20% to 28% — a fifth to over a quarter of the appraised value of the property in every year.

We would add that the basis of the "land" appraisal makes the collection even more extortionate. The State appraises tide and submerged lands on the same square footage basis as would apply to an industrial building site in the adjacent community. But this is land which, because of the public easement for commerce and navigation, and in some cases, because it is two or three hundred feet under water, cannot be used as a practical matter for anything other than the purposes which are involved here. (See, generally, J.A. 151.) One may, for instance, take the example of a tanker terminal located a mile off shore from the City of Los Angeles. There is 200 feet of water above the sea bottom. That water is swept by wind and waves of the Pacific Ocean. Yet the full sea bottom area above which tankers swing as they are anchored while loading and unloading is included in the lease. All of that property is valued as industrial property and a rental is fixed on that basis. Then, in addition, the throughput rental is tacked on as well. This is not a case when the rental collected on an appraised value is a modest rental; this is not property which has any value for any purpose

inflow. The emphasis in this brief is therefore on crude rather than products.

other than anchoring a ship. The value of the property half a mile down the coast, where there is no one who needs to anchor a ship, is probably zero.

We do not challenge the State's appraisal practices: appellees are willing to live with that problem. But to impose a tariff in addition goes too far. This is a plain and simple case of exploiting the strategic position of being adjacent to the sea in order to extract what the traffic will bear from shipping. That is precisely the sort of conduct against which the three Constitutional provisions at issue here were aimed.

VI.

Conclusion

The question in this case is whether the states are free to nullify the express prohibition against duties and imposts on imports by calling such a charge rent. The same question arises under the Commerce Clause's implied prohibition of the same kind of charge on interstate commerce.

Neither the State nor *amici* really address this problem: their emphasis on "proprietary interests" is no more than a pretense that the problem does not exist. As for their argument about monopoly, 93% is quite enough for a monopoly; and 98% — which is the combined acreage of the State and its political instruments — is overwhelming. What the State says is that, because of their title, any charge is permissible. We submit that the requirements of the Constitution are not so readily evaded.

Respectfully submitted,

PHILIP K. VERLEGER
COUNSEL OF RECORD
JOHN P. ZAIMES
MCCUTCHEN, BLACK, VERLEGER & SHEA
Counsel for Appellees Western Oil and Gas Association, et al.

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No. 84-16

In the Supreme Court

OF THE

United States

October Term, 1984

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members of the California State Lands Commission,
Appellants,

vs.

Western Oil & Gas Association, et al.,
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On Appeal from the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANTS

John K. Van De Kamp
Attorney General of the
State of California
N. Gregory Taylor
Assistant Attorney General
Dennis M. Eagan
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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PARTIES BELOW

Appellees state in their brief (p. i) that Edgington Oil Company is an additional appellee in this case. Edgington Oil Company was a named plaintiff in the lawsuit when it was initially filed in the district court (J.A. 6), but was later dismissed by stipulation of the parties (J.A. 1, Dkt. No. 21).

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REPLY BRIEF OF APPELLANTS

I. THE CHALLENGED FORM OF GROUND RENT IS NOT A CHARGE FOR THE MERE ENTRY OF GOODS INTO THE STATE

Without question, "a simple charge for the privilege of bringing merchandise into the country" would be prohibited under the Import-Export Clause. (See Appellees' Br., p. 18, citing *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276.) But the type of charge authorized by the challenged regulation is not premised on the entry of goods into the political jurisdiction of the State. Even where a tax varying with the quantity and value of the taxed goods is involved, such a tax may nonetheless be levied against imports if it is premised on the provision of governmental services enjoyed alike by importers and other citizens. *(Michelin, supra,* 423

U.S. at pp. 287, 288-289.) Rent charged for the exclusive private use of a specific parcel of public property is even more clearly outside the narrow scope of the constitutional proscription against imposts or duties on imports. The existence of this independent quid pro quo forecloses any assertion that the charge is being made for mere entry of the goods into the jurisdiction.

Early in their brief, appellees concede that "a person who has the exclusive use of a piece of the State's property should pay a fair rental for it. . . ." (p. 6.) It is therefore surprising to read later statements asserting that the State Lands Commission (Commission) is attempting to collect "a 'throughput rental' placed on every barrel of petroleum brought into the state" (p. 12) and likening the challenged rental mode to "a simple charge by a state for the privilege of bringing merchandise in or out of a State" (p. 17).

Not only is the charge tied to the leasing of specific parcels of state property, but the vast majority of goods entering California escape this alleged "tariff". No volumetric rent accrues, for instance, when a vessel enters and traverses state waters and offloads at any of various port facilities administered by local public entities or private parties. Los Angeles and Long Beach Harbors *alone* handle approximately 70 percent of the tonnage moving through California ports.[1] Neither the goods moving through these ports, nor the considerable additional tonnage moving through ports such as San Diego, San Francisco, Oakland, Sacramento, and Stockton generate any revenue to the State. It is a strange "tariff" that has such limited application.

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[1] See U.S. Army Corps of Engineers, Waterborne Commerce of the United States, Calendar Year 1982, Part 5, National Summaries, p. 18. A total of 108,158,139 short tons of cargo was moved through California ports in 1982. Long Beach handled 42,010,354 tons and Los Angeles 33,099,929 tons. (*Ibid.*)

To reiterate, the only occasion for charging of a volumetric rent by the State is where the loading or offloading occurs at port facilities that are on state-owned lands committed by lease to the exclusive use of one of the State's lessees. We are thus not dealing with rights of transient passage through state waters that overlie state-owned lands, rights that all members of the public share in common, free of charge. Rather, we are dealing with the exclusive appropriation of described parcels of the State's land for private gain. Similarly, no charge is made for random anchorage sites, to which any other vessel is equally entitled.

For these reasons, the oil companies' reliance upon *Cannon v. New Orleans* (1874) 87 U.S. (20 Wall.) 577, and *Harman v. Chicago* (1893) 147 U.S. 396, and upon certain dicta in *Packet Co. v. Keokuk* (1877) 95 U.S. 80, is misplaced.[2] Neither *Cannon* nor *Harman* nor the cited

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[2] *Cannon* was a Tonnage Clause case and is distinguished in our opening brief at page 34, footnote 24. The charge by New Orleans was imposed for the mere privilege of entering the port; no special land or services were provided the plaintiff.

In *Harman*, the City of Chicago imposed a license fee "for the keeping, use or letting to hire of any steam tug, or barge or tow-boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith." (147 U.S. at p. 409.) The city tried to justify the charge as compensation for its periodic dredging of the Chicago River, but the Court readily distinguished *Huse v. Glover* (1886) 119 U.S. 543, a case which had validated a toll for use of an improved waterway:

> "Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement." (*Id.*, at p. 411.)

In our case, the Commission is charging rent for specific parcels of land as a landowner. There is no parallel.

For similar reasons, the citation at pages 23 and 24 of appellees' brief to certain dicta in *Packet Co. v. Keokuk* is inapposite. There, the

dicta in *Keokuk* pertain to charges for the provision of specific property or services. This Court has held that where there is an exclusive private appropriation of public property, a special charge to the benefitted party is entirely proper, regardless of the nature of the commerce in which the party is engaged. (*St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 98-99.)[3]

Similarly unhelpful are cases such as *Eureka Pipe Line Co. v. Hallanan* (1921) 257 U.S. 265, and *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954) 347 U.S. 157. Each case invalidated an admitted tax, and the incidence of the tax, not its type or measure, was the sole focus of the

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unimproved submerged land to which the Court was referring was not appropriated to the exclusive use of a particular private company. The Commission does not suggest that it may charge "rent"—regardless of what form that rent may take, fixed or volumetric—for mere transient non-exclusive anchorage rights. The Commission's leases, in contrast, provide for exclusive rights in particular lessees to construct wharves on state property and to berth next to them.

[3] In rejecting the assertion that a per-pole charge for use of city streets by a telegraph company was a tax rather than a rental charge, the Court discussed the difference between transient, non-exclusive use of public property and exclusive use (which justified a rental charge):

> "The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public.... But the use made by the telegraph company is... permanent and exclusive. It as effectively and permanently dispossesses the general public as if it had destroyed that amount of ground." (*St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 98-99.)

It is for such an exclusive right of private appropriation, and only for such a right, that the Commission charges a rental, volumetric or otherwise.

Court's inquiry under the Commerce Clause. The question was whether the incidence of the tax was sufficiently "local" to escape invalidation under the Commerce Clause. Neither case stands for the proposition that the States are prohibited from charging rent for their property—volumetric or otherwise—when they allow it to be appropriated to the private use of persons engaged in interstate commerce.

II. THERE IS NO DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE

Appellees do not dispute that the challenged regulation applies to all types of state property, all types of lessees, all types of commodities, and all types of commerce; nor do they dispute that volumetric rents have been negotiated with persons other than the plaintiff companies regarding commodities other than petroleum and petroleum products. Based on a hodge-podge of statements and assumptions for which they offer no supporting authority, and which have no basis in the record, they nonetheless conclude that the regulation is inherently discriminatory.

The nub of appellees' thesis here is that commodities in intrastate commerce do not move by vessel, and that only interstate and foreign commerce is waterborne. The statistics on waterborne commerce compiled by the Corps of Engineers demonstrate otherwise. The tonnage figures of the Corps for California ports yield the following percentages, by type of commerce: "internal" and "local" commerce (commerce confined to the same inland body of water or port area, respectively), 13.9 percent; "coastwise" commerce (oceangoing commerce, both interstate and intrastate), 42.2 percent; foreign commerce, 42.4 percent.[4]

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[4] See U.S. Army Corps of Engineers, Waterborne Commerce of the United States, Calendar Year 1982, Part 5, National Summaries, p. 18. The total of the percentages is slightly less than 100 percent because

With particular regard to petroleum and petroleum products, the Corps figures do show considerable quantities of incoming crude oil, but they also show millions of tons of refined products being shipped out, much of it in "internal" commerce.[5] Among the refined products issuing from the refineries, some of the highest volumes are in residual fuel oil, which is the fuel used by numerous power plants along the California coast.[6] The utility companies receive these intrastate shipments of fuel oil over wharves located on lands leased from the State.[7]

The foregoing statistics demonstrate that foreign and interstate commerce are in no way the subject of inherently discriminatory treatment in the application of the challenged volumetric rental regulation.

III. THE STATE HAS NO MONOPOLY ON LAND SUITABLE FOR PORT FACILITIES

Appellees have manipulated some acreage figures in an effort to picture the State as having a monopolistic stranglehold on port sites along the California coast. Appellees' purpose is to contrive support for the "tariff" argument discussed previously and also to displace application of the "market participant" exception to application of the Commerce Clause.

Appellees have taken the vast ocean-covered acreage owned by the State, extending all the way out to the three-

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several of the smaller ports did not report their tonnage by type of traffic.

[5] See *id.*, Part 4, Waterways and Harbors, Pacific Coast, Alaska and Hawaii, pp. 5, 6, 22, 23-24, 25, 26.

[6] See *ibid.*; Donley, Atlas of California (1979) pp. 88, 102.

[7] See, e.g., regarding the San Diego Gas & Electric Company lease at Encina (see map attached as appendix to appellants' opening brief), Donley, Atlas of California (1979) pp. 88, 102, and Part 4 of Corps report on waterborne commerce, footnote 5, *supra*, p. 9.

mile limit, and then compared the total of that acreage to the aggregate near-shore acreage owned by private parties and by some 60 local governmental agencies. Predictably, they derive a large figure for the percentage of tide and submerged land that is state-owned.

The problem with such gross acreage comparisons is that they bear no relation to the much more limited geographic scope of the market in which the Commission is participating. The market under discussion is the market for sites where cargo can be loaded and offloaded. Both for physical and economic reasons, such sites are located in near-shore areas, and usually in the vicinity of population centers. With specific regard to sites for offloading and onloading petroleum and petroleum products, the vast majority of California's refining capacity is located in the San Francisco and Los Angeles metropolitan areas. (See Donley, Atlas of California (1979) p. 87.) That is also where the bulk of the existing port facilities are located. (See *id.*, pp. 102-103.) In San Francisco Bay and the Delta, for instance, there are some 71 commercial/industrial port facilities. (See *id.*, p. 103.) And as it happens, it is in and near Los Angeles and around San Francisco Bay where most of the tide and submerged land holdings of private parties and of local governmental entities are clustered. (See Br. for the Appellants, pp. 6, 20, appendix and map.)

Appellees' calculations thus bear no relation to market reality. At best, they are useless; at worst, misleading.

Appellees ultimately acknowledge that local governments holding grants of tide and submerged lands also participate in the market for port facilities, but then argue that they are nothing more than agencies of the State, and that it is still "the State" that lessees are dealing with when they obtain leases from local ports. This is nonsense. The State has absolutely no control over the rates set or negotiated by local ports. In fact, the competition for trade among

California ports (all of which are "state agencies" according to appellees) is quite fierce. The local government tidelands grantees are no more economically deferential to the State than they are to each other, as is clear from the recurrent litigation over the state-local allocation of royalties from oil produced on the granted land. (See, e.g., *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609; *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199.) It would come as a big surprise to both the cities and the State that "what goes into the pocket of one benefits the other." (Appellees' Br., p. 27.) From neither a legal nor an economic perspective is there any merger of the cities and the State.[8]

Appellees' attempt to downplay privately-held tide and submerged lands as an alternative location for port facilities is also flawed. The uncertainties that may have existed for a private tidelands owner in 1972 concerning the ability to proceed safely with development on tide and submerged lands (see Appellees' Br., pp. 26, 30-31) have been largely dissipated by the subsequent passage of the California

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[8] Cities are created by special charter ("charter cities") or are incorporated under general authorizing legislation ("general law cities"), are accorded autonomy over their local affairs by the California Constitution (art. XI, §§ 5, 7), and can act in other areas to the extent not preempted by state legislation. For funding, the cities look predominantly to local sources of revenue, such as the property tax. It is true that in the years immediately following the 1978 passage of the constitutional amendment restricting real property assessments and tax rates ("Proposition 13", article XIII A of the California Constitution), the cities looked temporarily (and not always successfully) to the State for "bail-out" funds. But the cities are being weaned from this increased economic dependence, and are looking for innovative means of raising needed funds from purely local sources, such as the sale and leaseback of public facilities, additional proprietary activities, and new local taxes and benefit assessments. (See Kroll, California Cities vs. Prop. 13, 3 Calif. Lawyer (No. 6, June 1983) pp. 28, 30.)

Coastal Act of 1976[9] and the confirmation by the Legislature, in 1974, that such owners are entitled to compensation for "lawful improvements . . . made in good faith" if ever the State should wish to devote the land to other uses.[10]

Finally, regarding appellees' strained argument that the Commission has a "monopoly" in the context of lease renewal, we note appellees' admission that plaintiffs' refineries have been in existence for some 60 years. (See Appellees' Br., p. 30.) This is ample time to write off the initial and any subsequent capital investment, even assuming that the initial lease term that was obtained was insufficient in length to amortize the cost of the adjacent refinery.[11]

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[9] Cal. Pub. Resources Code, § 30000, et seq. Under the Coastal Act, private landowners can now apply to the California Coastal Commission for permission to make improvements on privately-owned tide and submerged land. The development policies of the act specifically contemplate issuance of permits for "coastal-dependent industrial facilities", new or expanded port facilities, and new tanker facilities. (Cal. Pub. Resources Code, §§ 30233(a), 30260, 30261.) The 1976 act's predecessor, the California Coastal Zone Conservation Act of 1972, was adopted by initiative act approved November 7, 1972, which was after the date of the article cited by appellees.

[10] Cal. Pub. Resources Code, § 6312, Cal. Stats. 1974, ch. 1191, § 1.

[11] It was only in the context of lease renewals adjacent to existing refineries that the Ninth Circuit concluded that the companies "must use" tidelands administered by the Commission. (J.S. App. A-2.) For the reasons set forth in our opening brief at page 22, footnote 16 and accompanying text, this characterization erroneously assumes that the company has a reasonable expectancy of a lease in perpetuity. This Court certainly owes no deference to such an erroneous characterization, given the circumstance that this case is here following entry of summary judgment, not after an evidentiary trial on the merits regarding disputed facts. Cases such as *Branti v. Finkel* (1980) 445 U.S. 507, 508, 511, 512, fn. 6, 513, and *Pick Mfg. Co. v. General Motors Corp.* (1936) 229 U.S. 3, 4, are therefore inapposite. In any case, the lower courts here did *not* state, contrary to the impression created by

IV. THE CHALLENGED RENTAL MODE IS A REASONABLE ONE AND IS IN WIDE USE BY OTHERS; TO PROHIBIT ITS USE BY THE COMMISSION WOULD FORCE THE STATE TO SUBSIDIZE INTERSTATE AND FOREIGN COMMERCE

Concerning the reasonableness of the challenged rental mode, the existence or nonexistence of a state monopoly over tide and submerged lands is irrelevant. In a monopoly situation, if there were unilateral imposition of exorbitant *amounts* of rent, that might present a question for resolution by Congress, or possibly the courts.[12] But such a question could be presented even if the mode of rent used were the one favored by appellees — a flat annual amount that is a stated percentage of the appraised fee value of the land. What if the amount of such a flat rent were set at 90 percent, or even 120 percent, of appraised fee value? Would plaintiffs or other prospective lessees meekly concede that because the "mode" of rent was legitimate, they had no recourse? Of course not. Their argument would be that the *dollar amount* of the rent was excessive.

This helps focus the issue presented here; and the issue is not the reasonableness of particular amounts, but the

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appellees, that the Commission has a monopoly on all lands suitable for wharves, or that, "because of the location, the State's lands are indispensable to the use of the facilities for [interstate and foreign] commerce." (Appellees' Br., p. 5.)

[12] If there were a monopoly, and prospective lessees needing the lands for port facilities thought that the amounts of rental being asked were too high, they might seek relief in court on the theory that the "negative implications" of the Commerce Clause entitled them to rentals that were "reasonable" in amount. Whether the courts would engage in such ad hoc determinations of reasonableness is unclear. The Court has expressed reluctance in the field of taxation of interstate commerce, for instance, to enter a similar thicket, deferring instead to Congress. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 627-628.)

reasonableness of the volumetric rental mode in general. Appellees say that it is *per se* prohibited, regardless of rental amount. They request invalidation of the regulation that merely *authorizes* this *form* of rent.

This is not to say that actual rental amounts under particular Commission leases will not bear scrutiny. If and when there is a challenge to the reasonableness of specific rental amounts, the Commission is willing to defend such amounts in court or in any other appropriate forum.[13] We have noted appellees' efforts to color the perception of the more general issue presented here by putting forward alleged rates of return on volumetric leases already negotiated. Given the sweeping ban of *any* volumetric rent sought by appellees, particular rental amounts are of course irrelevant. Apart from their lack of relevancy, however, the record demonstrates that these figures are inflated; they are a product of bad arithmetic, selective manipulation of numbers, and unwarranted assumptions.[14]

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[13] The Commission is prepared as well to defend its leasing practices against attacks on any other ground—particularly against assertions that are false. One such falsehood is the statement by the oil companies at page 9 of their brief that the Commission demanded a volumetric rental as a condition of approving an assignment of a lease to Pacific Refining Company. The truth is that, at the time of the requested assignment, a firm rental still had not been negotiated with Pacific's predecessor; although a firm rental was negotiated contemporaneously with the assignment, approval of the assignment was not conditioned upon change of a rental already in place. (J.A. 113.)

[14] The principal flaw in appellees' numbers is their choice of the fee value figure to be used in calculating a rate of return. Uniformly, they have used the reduced value figure produced by negotiations with Commission staff, rather than the fee value determined by the staff's appraisers. This, of course, produces a higher rate of return. (Compare Commission appraised values and lower negotiated values (J.A. 114) with calculations and rental amounts contained in the various declarations of appellees (J.A. 21, 54, 61, 75). A review of appellees' calculations using the lower figures also reveals some bad arithmetic; and the

Another set of statements by appellees that are also both beside the point and inaccurate are those concerning the comparable land values used by the Commission's appraisers and their alleged use of these values regarding submerged lands in "200 feet" of water. It suffices here to say that Commission appraisers have used the values attributed by the ports to their wetlands, not the values of "industrial building site[s] in the adjacent community" (see J.A. 25-34); that most state sites involve lands immediately adjacent to shore (all five lease sites mentioned in appellees' declarations fit this description); and that, if a particular state site is indeed located at greater depths than are mooring sites in a port, that may actually be an advantage, given the saved cost of the continual dredging that is necessary to allow passage by today's deep-draft vessels in the comparatively shallow waters of enclosed ports (see J.A. 124-125).

Turning to the reasonableness of the volumetric rental mode *per se*, appellees do not really challenge the extensive evidence contained in the Administrative Record concerning the use of the volumetric rental mode for both improved and unimproved property. They do state that the testimony at the hearings was that "the effect of such a system of charges would be to discourage commerce" (Appellees' Br., p. 6), but the cited pages of the Administrative Record contain only general objections that the lessee's cost of doing business would be increased in an

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errors are all on the high side. Correction of these two factors yields substantial reductions in the calculated rates of return. For instance, appellees' *highest* calculated rates of return, 28 to 29 percent on the Pacific Refining lease (Appellees' Br., pp. 9-10) shrink under scrutiny to 17 to 19 percent. And the calculated returns should be reduced even further, when it is considered that appellees' projections for returns in future years assumed absolutely no increase in land value over a ten-year period; i.e., a land value negotiated in 1976 was assumed to be unchanged for purposes of figuring a rate of return in 1980 or 1985.

indeterminate amount (e.g., J.A. 163, 164, 180, 227, 234), or a lessee's calculations of increased rents, which calculations were based on the fixed rate schedule for various commodities that was part of the initial staff proposal, but later abandoned (see J.A. 116-117, 120).

Concerning practices of the ports, appellees again maintain that ports may use volumetric charges because of the additional services they provide. They ignore the extensive use of such charges for unimproved property by the ports and others. Further, the additional port services and facilities that they use as examples (dredging, navigational aids, and breakwaters) are independently charged for in the form of ~~a~~ separate non-volumetric fee called "dockage" that is applied by the ports solely against the vessel. (J.A. 428, 434, 446, line 23.) The volumetric wharfage charged by the ports, on the other hand, is one of a number of charges (also including wharf demurrage and storage) that are applied against a rate base that includes as a component raw land valued at its current fair market value. (J.A. 401, 402-404, 411-413, 415, 417, 423-433, 445-449.) We grant that the ports often (but not always) provide improved property, but it cannot be gainsaid that a portion of the wharfage charge even in such situations represents a volumetric rent on raw land.

At bottom, appellees' assertion here seems to be that there is only one way to obtain a fair return on leased property and that is by a flat annual rent. The practice of the ports and many other lessors establishes that the practice in the rental market is otherwise.

Neither is there anything in the source or nature of the State's title to tide and submerged lands that obligates it to subsidize its lessees by foregoing a rental mode that in some cases might yield a higher rent than would a fixed rent tied to appraised fee value. It is true that such lands are held in trust, but appellees' statement that the State's title "is not a

proprietary title" (Appellees' Br., p. 21) is simply wrong. This argument that the State is obligated to use its trust lands to subsidize those engaged in "commerce" was made by appellees before the California court of appeal and was flatly rejected as inconsistent with established law concerning the nature of the State's ownership of such lands.[15]

Finally, appellees refer to a general report on rates of return submitted to the Commission in early 1975. With certain exceptions regarding large marina sites (for which the report recommended percentage and gallonage rentals), the report recommended that a fixed return of 8 percent be sought for the Commission's leases. (J.A. 339.) Appellees focus on a sentence in the report which states that rentals based on a percentage of gross receipts are not used for

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[15] The court described the coexistence of a proprietary title and the State's trust responsibilities in such lands as follows:

> "[T]he State's ownership in trust lands has a dual nature: the governmental obligation to protect trust uses of such lands by the public (the '*jus publicum*'), and the proprietary right, as an incident of ownership, to obtain compensation for the sale or lease of such land to private parties (the '*jus privatum*'). *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 183; *People v. California Fish Co.* (1913) 166 Cal. 576, 593-594, 596, 599; *Marks v. Whitney* (1971) 6 Cal.3d 251, 260; *Boston Waterfront Dev. Corp. v. Comm.* (Mass. 1979) 393 N.E.2d 356, 359; *Brusco Towboat Co. v. State* (Ore. App. 1977) 567 P.2d 1037, 1044-1045, affd. in part (Ore. 1978) 589 P.2d 712, 718.) The *jus privatum* is the normal right to sell or lease something which is owned; the *jus publicum*, however, which cannot be sold or leased, restricts that normally broad right. When the State leases trust lands, it is exercising a proprietary function, with the caveat that it cannot unreasonably impair the public's trust rights (the *jus publicum*). (See *ibid.*; *Athletic Club v. Board of Harbor Commrs.* (1933) 130 Cal.App. 376, 386-387; *Spalding v. United States* (S.D. Cal. 1937) 17 F.Supp. 957, 962, affd. (9th Cir. 1938) 97 F.2d 697.)" (*Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 566 [164 Cal.Rptr. 468], hg. denied by Cal. Supreme Ct. July 2, 1980.)

industrial leases. (J.A. 324.) Accepting the accuracy of that statement, it certainly does not address industrial leases based on volume; and the studies conducted by the Commission's staff over the subsequent year and a half developed the numerous examples of volumetric rentals for the use of unimproved land for industrial purposes that are discussed in appellants' opening brief.

Appellees' point here again is that ground leases must be limited to a fixed rate of return in order to be "reasonable", and that variable rent ground leases are inherently unreasonable—a proposition that is at odds with actual practice in the rental market for ground leases. The fact that variable rent leases will often yield returns greater than fixed-rent leases is simply a truism, not an indictment of the rental mode. If variable rent leases did not on occasion produce higher returns, there would be no reason for employing such an alternative mode of rent in the first place.

The challenged rental mode is a reasonable one, and should be upheld. The opposite course—invalidating the Commission's regulation and entirely foreclosing the use of this form of rent, regardless of particular rental amounts—would force the State in many cases to subsidize the commercial enterprises of its lessees. Nothing in the Constitution requires this anomalous result.

CONCLUSION

For the reasons discussed in this and appellants' earlier brief, the decision of the Court of Appeals for the Ninth Circuit should be reversed, and the case remanded to the district court for entry of an order denying the motion of the plaintiff companies for summary judgment and granting that of the State Lands Commission.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650

Counsel for Appellants

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